STATE OF WISCONSIN

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

DISTRICT I

Case No. 2021AP1036-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JUAN ANDRES BALDERAS, JR.,

Defendant-Appellant.

APPEAL FROM JUDGMENT OF CONVICTION AND SENTENCE ENTERED IN THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE MICHELLE A. HAVAS, PRESIDING

BRIEF OF DEFENDANT-APPELLANT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The issues presented by this appeal are complex. The issue of self-defense and defense of home and property ("Castle Doctrine") should be addressed by the appellate court and, therefore, publication is recommended. Oral argument is not needed.

STATEMENT OF THE ISSUES

I. Whether the trial court erred in not granting a new trial due to a new witness as newly discovered evidence, a *Brady* violation or in the interest of justice?

Answered by the trial court: No.

II. Whether the failure to address the statutory language referenced in WIS JI-CRIMINAL 805A after the jury question, does bodily harm have to occur "before" force can be used in self-defense or can a person use force if they merely fear that they will be harmed, was error by the trial court?

Answer by the trial court: No.

III. Overall, was the trial unconstitutional for a lack of fairness and due process?

STATEMENT OF THE CASE

I. Procedural Background

The defendant-appellant, Juan Balderas (hereafter "Juan") was originally charged with one count of first degree recklessly endangering safety, use of a dangerous weapon, a Class F Felony, involving "EB", contrary to sec. 941.30(1), 939.50(3)(f), 939.63(1)(b) Wis. Stats. and one count second degree recklessly endangering safety, use of a dangerous weapon, a Class G Felony, involving EB, contrary to sec. 941.30(2), 939.50(3)(g), 939.63(1)(b) Wis. Stats. (R1) The criminal complaint alleges that on November 12th, 2018 at approximately 10:05am, officers with the Milwaukee Police Department ("MPD") were dispatched to the area of 15th Pl. and Harrison, City of Milwaukee, Milwaukee County, WI in regards to a shooting complaint. Officers came into contact with the victim, EB, who had a graze gunshot wound to the side of his neck. EB informed officers that he had gone to his brother, the defendant Juan's house, at 1336 W. Harrison St. to discuss some ongoing family issues that were causing

problems between siblings on social media and via texting back and forth. EB stated he parked his car on Harrison St. near the defendant's house on the corner of 14th and Harrison. EB observed the defendant enter the driver's seat sitting with his back to the driver's side door. EB approached the driver's side door at which point Juan turned suddenly and fired a shot striking EB in the neck.

Juan was found guilty of both counts after a September, 2019 jury trial and was sentenced October 18, 2019. The Hon. Michelle A. Havas, Br. 10, was presiding judge.

Per R67 (as listed in R159, Index), the court entered judgment on the verdicts despite the defense motion for judgment notwithstanding the verdict. (R67:10:10-19)

Juan was sentenced on Ct. 1 to 4 yrs. IC and 4 yrs. ES. On Ct. 2, in addition and consecutive to Ct. 1, 4 yrs. IC and 4 yrs. ES. (R62:31:1-5) 35 days sentence credit was granted. (R62:31:6-7)

Appellant-defendant appeals:

1) The jury verdict;

2) The trial court order to deny judgment notwithstanding the verdict;

3) The sentence of the court;

4) The trial court orders to deny post-conviction relief.

Appellant-defendant also seeks release on bond pending appeal, denied in the trial court.

See R83, R104, R108, R128, R137 and R140.

The jury was instructed on the elements of 1st and 2nd degree reckless endangerment.

But early in the case, the parties and the court recognized this was about self-defense.

At the preliminary hearing, 12/12/2018, the State's witness, a Milwaukee Police detective, stated EB, the alleged victim, initiated the confrontation at Juan's residence as a continuation of an ongoing text and social media dispute

involving brothers Juan, Daniel and EB. (R55:5:10-12) The detective stated EB may have startled his brother. (R55:6:17)

The result was a first firearm shot by Juan in self-defense per Juan's testimony. EB said the shot was intentional and illegal.

At the preliminary hearing, it goes on to state, "the victim…heard gunshots" (R55:6:25), after he turned away from Juan and started running away from the area, per the detective. (R55:6:24-25) This is the basis for Count 2.

Almost four months later, at the FINAL PRETRIAL CONFERENCE on 04/04/2019, the State commented, by AAG Bashirian, "I'm not surprised by the self-defense thing…" (R48:3:22-23)

II. Factual Background

At trial, the alleged victim, EB, stated, me and my younger brother, we kind of don't associate or talk to Juan on a regular basis. (R60:7:20-22) He said his brother Daniel was

"arguing on social media…" and that he, EB, was on Daniel's side and said he intervened based on Facebook posts. (R60:9:1, 5-7, 15-16)

EB "decided to go to Juan's house" apparently to confront him. (R60:11:3) EB said Juan's "social media" activity made him feel "shouldn't be happening…" (R60:11:6-7)

The brothers were not communicating at the time. (R60:12:12-13)

EB parked across from Juan's house. (R60:12:23) It was on S. 14th before W. Harrison in Milwaukee.

EB went onto Juan's property uninvited. He proceeded to approach Juan from the alley in the narrow space between the garage and Juan's work van. (R60:16) (R60:32:23-33:7) (R60:34: - 16 35:10) EB testified, "When I walked to the van, he [Juan] was sitting in the driver's seat." (R60:17:6-8)

Juan shot EB per Juan after EB opened the van door and then EB moved back towards the alley about "12-15" feet away, turned and yelled, "What the hell, you shoot your own brother…" (R60:20:16) (R60:19:3)

EB said Juan aimed the gun again towards him. (R60:21:13)

EB was not looking where Juan was shooting, as EB was running up the alley away from Juan's residence and garage area. (R60:21:17-24) "I wasn't looking back", EB said.

EB later said he did not see any additional shots. (R60:54:14-16) Then he said he did. (R60:55)

EB heard "maybe two or three…" shots. (R60:22:11)

EB was wearing a hooded sweatshirt but said his hood was not on. (R60:23:18-19)

EB said he did not need stiches. (R60:24:17-21)

Weeks later, EB said there was a hole in the "sweater" (R60:25:16), where he had been shot. The police had not kept this as evidence at the scene nor hospital. It is State Ex. 1.

EB said he did not see the hole in the "sweat-shirt" until he "put the hoody on." (R60:26:17-21) Defense counsel at trial did not object to its receipt as evidence. It was shown to the jury. (R60:27)

It should be noted when EB was asked by defense trial counsel if the MPD body cam video of his interview at the scene (5 minutes and 16 seconds in) contradicted his trial testimony, the court apparently prevented a showing of the video after a sidebar. (R60:41:13 – 42:17)

After another sidebar to structure a defense question apparently requested by the State and ordered by the trial judge, EB denied he told MPD he startled his brother and opened the van door. Enrique said, "I don't recall that", regarding the van door. (R60:44:5-25)

When defense counsel tried to ask EB, if there really was eye contact with Juan after EB got out of his car, in other words, was he invited onto Juan's property with verbal or nonverbal communications, the State objected and the court sustained. (R60:48:14-18)

Then, EB admitted he never told MPD he made eye-contact with Juan as testified to. (R60:52:2-13)

EB confirmed only the first shot hit him. (R60:54:11-13)

The trial court apparently allowed the prosecutor to lead EB with his questions to reverse previous sworn testimony, which the court handled differently for the defense in cross-examination after sidebars. (R60:57:12 – 59:1)

The jury left and the sidebar review is in part the basis of a claim by the defendant to a constitutional lack of a fair trial and due process. (R60:61:14 – 63:6)

Juan denied EB's version in Juan's police-recorded interview. (R60:74 – 77:6) Juan told MPD after the first shot when he realized it was EB, he fired 2 shots into the neighbor's yard and not at EB. The number of shots was confirmed by MPD forensics to be 3 in total, 2 into the yard. (R60:76:2-19)

Juan said he was scared. (R60:77:2-6)

Juan said he saw "somebody literally with their hoody on creeping up like this to the side of my van." (R60:79: 22-23)

Juan had not seen anyone prior. (R60:80)

Juan legally kept a gun for protection. (R60:81)

After the shot that hit EB, EB ran towards the garbage cans in the alley. Juan feared EB may be armed. Juan fired a 2nd and 3rd shot as warnings. (R60:83-84)

Milwaukee Police arrived and established a perimeter. Then, the evidence collection process began, including the search for witnesses.

MPD used body and squad cams on the scene. In one video, a woman can be seen walking behind the squad car where Juan was detained in the backseat.

That woman is Amanda Bailey. The defense moved for a new trial in post-conviction proceedings. The trial court granted a hearing on the defense assertion Amanda was a previously undisclosed and unknown eyewitness to the actions of both parties at the time of the shooting and immediately before. The court set a briefing schedule. (R113)

A hearing followed on April 7, 2021. When the hearing began, the presiding judge stated, "We are here for a very limited hearing." (R137:3:11-12 and referenced in R159 on p. 4 of 5, as "Limited Evidentiary Hearing")

The circuit court continued, "So for the limited purposes, this is not a mock hearing, it is not that sort of thing, but at this point I'm going to allow testimony merely as it relates to Ms. Bailey, whether she was on the scene or however." (R137:3:22-25)

These statements followed the court's statements on the record at the motion hearing on July 9, 2020. Before the court had apparently fully reviewed the written motion and submissions with it, the court said, "Now I'm on part three of the test messages and calls by Amanda Bailey…but I do find the timeline referenced by Mr. Bashirian [the prosecutor] does, in fact, line up." (R104:22:4-14)

The defense asserted the witness was at the scene. (R104:22:17-25) The State denied Amanda Bailey was present, often in a mocking or dismissive tone, also expressing a personal opinion at length about the "ridiculous" nature of the applicable statutes. (R104:7:11 and R104:15:17)

The State continued with a lengthy statement, in opposition to the evidentiary hearing, including questioning if Amanda Bailey was at the scene and talked to police. (R104:14)

The State referenced the Amanda Bailey Affidavit, R84, challenging and mocking her assertion she spoke to the police

at the scene. In one example, the AAG references a statement by Amanda, "I [Amanda] tried to talk to the police but they wanted nothing to do with me". There was squad video and body cam video from numerous officers, and she doesn't appear in any squad video which shows, basically, the entire crime scene, the AAG said. Then the AAG, the prosecutor, does admit Amanda was in a squad video, "31 minutes after police arrival." (R104:11:4-11)

The prosecutor continues references to female MPD officers at the scene. (R104:13) Then, the State goes on to say eyewitness Amanda Bailey's sworn statement was "rubbish…a false statement with no basis in the truth…" (R104:14:11-12) The prosecutor even accused Ms. Bailey of perjury. (R104:15:18 and R22)

Later, when this proved to be both unfair and inaccurate, the prosecutor did not correct the record or apologize for his false or at a minimum mislead assertions on the record.

The trial court, in ruling, tried to classify Ms. Bailey as a third eyewitness along with Juan and EB. (R104:25:5-14)

The court stated, "whether Ms. Bailey may testify and give more credibility to one or be discredited as to one, regardless, there were eyewitnesses. This was not a guess. The jury had to look at this evidence, and they made their decision." (R104:25:12-16)

In the hearing on April 7, 2021, Amanda Bailey testified, and referenced a map. (R137:5)

Amanda testified to her location right before the shooting of EB by Juan. She was in the alley approaching 14th off W. Harrison in Milwaukee City, in view of Juan's residence. (R137:20: - 137:8:10)

The witness explained why she was on scene. (R137:10-19 – 137:12:8)

Amanda is friends with Juan's live-in domestic partner, Delvina Harris. (R137:12:9-24)

Amanda recognized Juan's red electrician work truck right before the shooting. (R137:13:14-17)

Amanda saw a man, later identified as EB, walking (R137:14:6), on the east side of 14th. (R137:14: 12-15) Amanda was on the west side.

Amanda said EB "started picking up the pace." (R137:14:22-23)

Amanda confirmed her location and time. (R137:15) Amanda referenced her Facebook Messenger exchanges regarding the time. (R137:15 – 137:16:2)

Amanda stated EB had "a hood on". (R137:16:5)

Amanda "heard a pop". (R137:16:24). Then she "heard the second one". (R137:17:2).

Amanda went into greater detail about EB's approach. (R137:17:13 – 137:18:1)

Pointing to the map, Amanda indicated EB had approached the van between the garage and van. (R137:17:18-24)

Amanda saw "him" [EB] run after a "scream". (R137:19 8-9)

Then Amanda "started calling Delvina". (R137:19:14) Amanda kept calling (R137:20:1-3) on Facebook as she left the scene in fear.

Amanda shortly after, "heard the police". She decided to "walk back". (R137:20:6)

When Amanda walked back, she testified, a Milwaukee Police Officer ("MPO") said, "You can't come here, I said, 'why can't I come in here? I was here when it happened'". (R137:20:8-11)

Amanda told the MPO she lived up the block. (R137:20:12-15)

Amanda spoke to "a uniformed Milwaukee female police officer." (R137:20:21-22)

Amanda offered more detail on the scene. (R137:21:3-20)

Amanda said the other officers present did not speak to her. The officer who did had a body cam. (R137:22:4-12)

After this, the police denied Amanda access to the house to check on Delvina, so Amanda said, "I kept calling." (R137:23:3)

Amanda left the scene, "because the police are not listening to me …" (R137:23:6)

Amanda talked to Delvina, and "walked back down there because I knew she was safe." (R137:23:15-16)

Once back there, Amanda tried again to give her eyewitness account to the same officer, who refused her again and told her to leave. (R137:23:20 – 137:24:16)

That is when she saw a man later identified as Juan in the back of the squad car, consistent with MPD squad video referenced above. (R137:18-23)

Amanda tried one last time to get MPD attention. It failed. (R137:26:22 – 137:27:17) MPD would not listen to her eyewitness account.

Amanda posted on Facebook what she saw, Ex. B at the hearing. (R137:28:8-21)

Amanda said she saw "someone got shot" who tried to "open someone's car door".

The police never contacted her. (R137:30:4-6) No investigator did, no lawyer nor Juan did either. (R137:30:8-24)

Amanda said, "they ignored me". (R137:47:19) So no one with the case was aware of Amanda's eyewitness account before or during trial. (R137:30:25 – 137:31:4)

The prosecutor in cross-examination tried to undercut Amanda's testimony and affidavit.

Despite the AAG's vigorous and at times hostile comments about Ms. Bailey and her eyewitness statements, made knowing her as a state witness in a previous case, the State was forced to accept Amanda was at the scene.

The State played the video of Amanda at the scene. (R137:42:6)

It should be noted, the Facebook exchange was included in the *Affidavit of Delvina Harris*. (R102, ¶6) (R137:45:5-6)

MPO Anna Ojdana testified in the April 7, 2021 Hearing. Contrary to the vigorous denials of the State on July 9, 2020, MPO Ojdana acknowledged body cam footage, not turned over by the State in the trial despite statutory obligations to do so. § 971.23(1)(a), Wis. Stat. (R137:50: 1-12) (R137:52:16 – 137:53)[1]

MPO Ojdana acknowledged talking to Amanda Bailey but only once, not twice as Amanda stated. (R137:51)

[1] The trial court was intending to close testimony by 5pm on April 7, 2021, for release of staff. R137:54:16-20, also R128:3:14-15, 20-21)

But the officer was vague, even elusive, on the use of her body cam as she arrived at the scene. (R137:53:21 – 137:54:5)

MPO Ojdana stated that her canvass turned up "no eyewitness incident". (R137:55:23) But there was. Her name is Amanda Bailey.

Argument

I. The trial court's order to deny a new trial due to a new witness as newly discovered evidence, in the interest of justice or as a *Brady* violation, should be reversed and the case remanded with an order for a new trial.

The court had made clear in granting the hearing on the new witness as a basis for a new trial: the defense was allowed only one witness, "Amanda Bailey". (R131, Jan. 29, 2021)

The defense respected and complied with the trial court's order.

However, at the April 7, 2021 hearing, the trial court, without notice to the defense, allowed the State to call "some

officers". (R137:3:17) It is unclear the source of that information and when the decision was made to allow.

To further show the disparate treatment between defense and State, the court did not apply the 5pm deadline to the State as pressed on the defense. (R137:48:17-25 – 137:49:4)

Respecting the original directive of the Court, confirmed at the beginning of the hearing, the evidentiary hearing was to be limited. This included uncertainty about additional dates if not done on April 7, 2021.

So on April 26, 2021, the Court heard arguments. No amended order was given to prepare or propose additional witnesses.

Despite that lack of notice to the parties, the Court asked if the parties did have additional witnesses. (R128:4:11-23) The defense replied, "not today", consistent with the court's original unamended order. It was confusing the way the Court presented this.

Clearly, the defense had requested Delvina Harris as a witness. Her affidavit is in the record as R98-102. She would confirm contact with Amanda Bailey at the scene. Delvina was present in court on April 26, 2021. In response to the court's sudden request for additional witnesses, the defense stated it would have called Delvina Harris. (R128:6:5-23)

The AAG as prosecutor said the following, "…it doesn't really add to that the crux of the case is, which is what happened when he got to that door; you know, did the jury think that the defendant recognized his own brother and shot his own brother, or did he act in self-defense? It was at the door when that issue occurred, and Amanda Bailey can't add to that, and the jury found him guilty after they heard all the evidence and heard from the two people." (R104:11:8-16)

There is nothing in the record to indicate EB was invited onto Juan's property or into Juan's work truck. Nor does the record indicate EB had a right to do either without Juan's consent or invitation.

No case or statute is cited in the record that a family relationship – especially a distant, estranged one – is an exception to Juan's right to exclusive possession of his dwelling or his vehicle or the right to defend that property or his person.

The record shows Amanda Bailey could testify to facts relevant to jury members who were the factfinders.

The jury asked the following question during deliberation. (R109) "Does bodily harm have to occur before, and before is underlined, force can be used in self-defense or can a person use force if they merely fear that they will be harmed?" (R109:2:12-17)

Amanda Bailey's testimony would go directly to this question asked by the jury.

Amanda's testimony would verify EB's entry onto Juan's property was sudden, the approach into the vehicle was aggressive, "Q. Maybe a car jacking? A. It could have been, yes." (R137:19:4-5)

Amanda had experience as a security guard. (R137:27:3-20) Her experience and observations would have informed the jury.

Amada was present at the scene for a legitimate purpose, having asked Delvina Harris if she could work on her vehicle on Delvina's and Juan's property. (R137:10:23 – 137:11:22)

Amanda was familiar with Juan's red work truck. (R137:13:14-17) So she paid attention when someone was approaching the van. She had an excellent view. (R137:13:18-25)

Her testimony is favorable to the defense and Amanda testified she tried to inform the police on scene, "that I was one of the witnesses." (R137:39:8) Amanda said, "I was there". (R137:39:13)

The officer at the scene, Anna Ojdana, confirmed Amanda said, "I lived around the corner…" (R137:54:25) But MPO Ojdana "figured that she was not present" (R137:55:1-

2), despite MPO Ojdana's responsibility to "survey other neighbors" and "canvas". (R137:55:8-11)

MPO Ojdana generated body cam footage at the scene. (R137:51:7-11)

The State did not disclose MPO Ojdana's body cam video or turn it over to the defense before trial.

Failure to turn over MPO Ojdana body cam video deprived the defense of favorable evidence at trial. This evidence could have supported the self-defense claim. Including, but not limited to, impeaching EB who said his hoodie was not up. Amanda said it was, which infers a desire to conceal identity prior to and at the point of contact with Juan.

MPO Ojdana testified she became "aware" of the failure to disclose the body cam, "a couple of days ago". (R137:52:18-20)

The body cam video was material to the defense in that it would lead to informing the jury on facts inquired about in the relevant jury question.

The body cam video would have been reason to subpoena and call MPO Ojdana as a witness at trial and use the video for impeachment, as appropriate. It would have helped place Amanda at the scene both times, which MPO Ojdana denied under oath later.

The defense was denied the usage of the video in preparation for trial and at trial by the inadvertent suppression of this evidence.

One example of the potential impeachment use is to clarify when the body cam was on and off, as testified to by MPO Ojdana. This would allow a complete analysis of other MPD body and dash cam footage at the scene.

The jury should decide if Amanda was there as the defense articulated in argument. (R128:32)

The factfinder did not have the chance to judge the credibility of Amanda Bailey nor MPO Anna Ojdana.

The trial judge said, in response, "I am not persuaded that the evidence that would come from Ms. Bailey justifies a new trial in this matter." (R128:35:7-9)

The court challenged the timeline and found in favor of the State on April 26, 2021, as the court previewed on July 9, 2020.

The court on July 9, 2020, was dismissive of Ms. Bailey but acknowledged "testimony" involved "credibility" determinations by the jury. (R104:25:9-14)

Then the court said, "the jury had to look at this evidence, and they made their decision." (R104:25:15-16)

But the jury did not have all the evidence. Amanda Bailey was unknown to the jury and her testimony was material and exculpatory in support of Juan's self-defense privilege asserted in this case. The jury did not have key evidence to

decide if the "reasonable" element of both counts was proven beyond a reasonable doubt by the State.

On April 26, 2021, the court ruled the Amanda Bailey testimony did not justify a new trial as it was "cumulative". (R128:35:22)

The court's further comments go to the credibility of the witness, which is for the jury. The court did not reference the review standard and if the applicable standard was in a light most favorable to the defense.

The court attempted to reframe Amanda's testimony. Amanda saw a man, later identified as EB, enter Juan's property and approach at an accelerated pace towards Juan's work van.

By failing to turn over the MPD body cam video of MPO Ojdana, *Brady* applies if material and exculpable or useful in impeachment.

The Motion for Postconviction Relief (R110) was denied. The court ruled on April 26, 2021. The trial court stated, "so I don't find that Amanda Bailey's testimony would have been able to assist the jury to the point that a new trial is justified under 805.15 [2], and, therefore, I am going to deny that. I believe it - - I don't believe its material evidence. I do believe it would be cumulative…therefore, I don't believe that any new evidence would be likely to change the result; therefore the post-conviction motion for a new trial is denied." (R128:38:15-24)

The court did not address the *Brady* issue specifically nor the issue of a new trial in the interest of justice.

But the trial court did confirm its order to only allow Amanda Bailey as the sole witness and then without notice or explanation allowed MPO Anna Ojdana for the State and denied Delvina Harris for the defense. (R128:39-40)

[2] The defense amends all its prior references to § 805.15 or § 805.16 to reference §974.02, Wis. Stat.

The defense filed for reconsideration for both the denial of release on bond pending appeal and for the denial of a new trial. The trial court denied reconsideration. (R108, 140)

The court's order in R108, seems to give great weight to the court's classification of the brothers EB and Juan as the alleged victim and defendant in this case as also eyewitnesses.

In the order eFiled 09-23-2020, the trial court denied finding the "proffered eyewitness [Amanda Bailey] was untruthful about being present for the shooting." (R108:2)

In the order of denial of reconsideration on 05-24-2021, the trial court confirmed its denied findings of 09-23-2020 (R108) when the court stated, "The court did not find her [Amanda Bailey as eyewitness] to be credible at the hearing after listening to her testimony and reviewing the video evidence." (R140:2)

The court may also be communicating prejudice against the defense in its orders by stating things like, "The defendant complains…" [R140:2] and its statement, "counsel misstated

that there were no other eyewitnesses in this case (Tr. 7/9/20, p. 25)". (R108:2)

The trial court states in its decision and order on 05-24-2021 (R140:1), "…the defendant did not object when the court indicated at the conclusion of the April 7 proceeding that the evidentiary portion was done. (Tr. 4/7/21, p. 56). Although Ms. Harris was in court on April 26, 2021, counsel answered 'not today', when the court asked if the defense was calling any witness. (Tr. 4/26/21, p. 4) Only *after* the court ruled on the motion did counsel ask to present her testimony."

Defense counsel stated prior (underline added for emphasis) to the court's ruling, which is in the record starting at R128:35:7, based on the perception of confusion due to the lack of notice of continued evidentiary hearings combined with the original written and later verbal order of the court limiting the evidentiary hearing to Amanda Bailey, the following:

"We would have called, possibly, Delvina Harris as a witness today, but I was - - my understanding today was just

closing arguments. I will say this about her just very briefly, Your Honor: I did submit her affidavit. It's in the file, and she was the - - the mother of Juan's children. He lived with her in that house. She's the friend that Amanda Bailey referenced. She was the one that was receiving the text messages and the Messenger phone calls as well as the cell phone calls from Amanda." (R128:6:7-22)

R130, the map referenced by Amanda Bailey in the hearing on April 7, 2021 (R137, starting at p. 5:22), tells the story of her testimony as material to this case and useful in impeachment by the defense of EB, the alleged victim and MPO Anna Ojdana, the MPD canvasser for witnesses at the scene.

Amanda had a clear view, across S. 14th Street, walking in the alley just across from the defendant Juan's driveway and garage behind the driveway, where Juan's red work truck was parked close to the garage. She was approaching.

Amanda saw what turned out to be EB, the estranged brother of Juan, walk in front of her towards the back of the truck, which was facing W. Harrison Ave, with the back of the van closer to the alley.

Amanda saw EB "pick up his pace" as he moved into the confined space between the garage and work truck. The defense alleges in the trial court a *Brady* violation, *Brady v. Maryland*, 373 U.S. 83 (1963), for suppression by the State of material evidence favorable to a defendant which violates due process. See *State v. Wayerski,* 2019 WI 11.

In *Wayerski*, the Wisconsin Supreme Court stated in ¶36, "The materiality requirement of *Brady* is the same as the prejudice prong of the *Strickland* analysis. …Evidence is not material under *Brady* unless the non-disclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different result…"

Applying the first component of the *Brady* analysis, the evidence at issue must be favorable to the accused, either because it is exculpatory or impeaching. *Wayerski*, ¶ 45.

The State and the trial court do not agree with the defense the evidence in the body cam video of MPO Ojdana is favorable to the accused. The trial court found the evidence from the new eyewitness, Amanda Bailey, identified in the MPO Ojdana body cam video, was "cumulative" and at the same time, "not credible."

The defense asserts on appeal the testimony of Amanda Bailey is favorable to the defendant. It starts from the body cam video of MPO Ojdana. Amanda was there at the scene and supports the defendant's testimony that EB's entry on his property was uninvited and perceived as a threat.

This perception by Juan, that "somebody literally with their hoody on creeping up like this on the side of my van" (R60:79:14-23) …"opened up the door, and he swung at me

…" (R60:80:22), meant that it was reasonable that he, Juan, believed he was in danger.

That fear for his safety, at his job sites primarily, lead to legal ownership of a gun he kept in the van. (R60:81:8-21)

There was no denial by EB in the trial that he entered Juan's property uninvited. EB confirmed his relationship with Juan was estranged and his motive was to confront Juan over an ongoing social media dispute with a third brother, Daniel. (R60:8:10 – 60:12:20)

EB said he parked directly across the street from Juan's house and lot, on 14th Street. (60:12:21 – 60:13:15)

II. Failure by the trial court to fully address the statutory language of self-defense in § 939.48(1), Wis. Stat. and the self-defense privilege in response to the jury inquiry, if not before, and that the court failed to reference WIS JI-CRIMINAL 805A and the "Castle Doctrine" in § 939.48(1m)(ar), Wis. Stat., was error.

EB walked, uninvited, picking up his pace, to confront Juan on Juan's property, in his vehicle.

Both the State and the alleged victim EB in the trial repeatedly focused the case on the relationship between the brothers.

There is also an emphasis by the prosecution on the eye-contact upon EB's arrival.

The fact that Juan and EB are brothers in not an exception to the self-defense statute, § 939.48(1), Wis. Stat.

Self-defense is a privilege under the law. § 939.45(2), Wis. Stat., *State v. Watkins*, 2002 WI 101, 255 Wis. 2d 265, 647 N.W.2d 244.

The trial court did not present this statute to the jury. And it was Juan's reasonable belief as to his safety and the need to protect his property, the so-called "Castle Doctrine", that is the central question of this case.

To implement the "Castle Doctrine", the Legislature enacted 2011 Wisconsin Act 64, effective date December 21,

2011. Per WIS JI-CRIMINAL 805A, p. 2, Wisconsin's version is more limited than that of Florida.

The Scope section of WIS JI-CRIMINAL 805A, p.2, states, "under the Committee's approval … the new rule goes only to the defendant's burden of production, will not need to be defined for the jury."

The defense challenges this. The language of §939.48(1m)(ar), Wis. Stat., as referenced by WIS JI-CRIMINAL 805A, states "…the court…shall presume that the actor reasonably believed that the force was necessary to prevent imminent death or great bodily harm to himself…if the actor makes such a claim under sub.(1) and either of the following applies:

1. The person against whom the force was used was in the process of unlawfully and forcibly entering the actor's dwelling, motor vehicle…and the actor knew or reasonably believed that an unlawful and forcible entry was occurring.

2. The person against whom the force was used was in the actor's dwelling, motor vehicle…after unlawfully and forcibly entering it, the actor was present in the dwelling, [or] motor vehicle…and the actor knew or reasonably believed that the person had unlawfully and forcibly entered the dwelling, [or] motor vehicle…"

(Underline added)

These are "predicate facts." WIS JI-CRIMINAL 805A, p. 2.

It should be noted § 895.07(1)(h), Wis. Stat., defines a "dwelling" as including "driveways", which is where Juan's van was located per Juan, EB and Amanda Bailey's testimony.

The Committee's Conclusions state on p. 4 of WIS JI-CRIMINAL 805A, "the new rule in § 939.48(1m)…does not change the existing privilege of self-defense defined in §939.48…"

On p. 5, it states "The Committee realizes that this approach differs from what some may believe to be the impact of the new rule…and is…most faithful to the statutory language."

The defense challenges that statement on faithfulness. The "presumption" references on p.6-10, strain to say the jury should not hear the very language intended by the legislation to give a stronger self-defense claim if the self-defense claim involved events that occurred at your home or in your vehicle.

III. Overall, the trial was unconstitutional for a lack of fairness and due process.

If WIS JI-CRIMINAL 805A is applied, the defendant in this case is effectively denied the "Castle Doctrine" adopted by the Legislature. This raises due process and equal protection of the laws constitutional issues.

The 5th and 6th Amendments to the U.S. Constitution, as applied to the State of Wisconsin under the 14th Amendment, were violated in the trial.

In *State v. Lee,* 108 Wis. 2d 1, 321 N.W.2d 108 (1982), the Wisconsin Supreme Court discusses a jury instruction inconsistent with the statute. The court states an erroneous instruction should not be placed above the clear meaning of the statute. J. Day concurring, with J. Callow concurring in J. Day's opinion.

It is the defendant's burden to establish a reasonable likelihood that the jury unconstitutionally applied an instruction, even if the instruction was legally accurate. The defense has met that burden.

The Court of Appeals confirmed the "Castle Doctrine" when it stated, "one who is attacked in his or her home can use force against the intruder to defend himself ". *State v. Chew*, 2014 WI App 116, ¶14. The Court of Appeals stated a garage is part of the dwelling, citing the statute, at ¶12 of *Chew*.

Chew, ¶ 7, makes clear that "whether there are sufficient facts to require the final court to give a certain jury instruction is a question of law we review *de novo.*"

The statute, § 939.48(1m)(ar), is not ambiguous. It codifies the right of a person to defend himself or herself in one's home or motor vehicle, or on one's property, along with defense of that property.

The Committee denied the defendant the communication of this right by failing to direct the trial court to inform the jury of that right, which applies in this case.

Then, the trial court's presiding judge refused to do so a second time when the jury asked if it should consider the acts before (the jury question underlines this word, R109) the use of deadly force.

The jury should have been informed of the statutory provision that there is a presumption of that right if the predicate facts apply. We should not allow a strained interpretation to prevent the very purpose of the statute.

Failure to so inform the jury in this case affected the defendant's substantial rights and was not harmless error.

There is a "low bar" to require the self-defense privilege jury instruction. *State v. Stietz*, ¶16, 2017 WI 58 (citations omitted)

Amanda Bailey's testimony is material because it addresses § 939.48(1m)(ar)1. and 2. (Underline added)

The "presumption" in the Statute is meaningless when the defendant is clearly entitled to a self-defense jury instruction but not given as interpreted by the Committee, whose revision to WIS JI-CRIMINAL 805A Law Note was approved in June 2019. The presiding judge did not use her discretion to do so. The defense asserts this was error.

The Court of Appeals is respectfully requested to fully implement § 939.48, Wis. Stat., by ordering a new trial in the interest of justice to preserve the defendant's right to a fair trial.

The jury instructions given in this case on 1st and 2nd degree reckless endangerment, are 1345 and 1347. respectfully. (R28) (Use of a dangerous weapon is a modifier in both counts)

In this case, Juan was going out of his house to his work van located on his driveway next to his garage to go to work. This is the foundation of the "Castle Doctrine".

Then, when EB ran away after the shot that grazed him, the forensic evidence showed the next two shots were warning shots not directed at EB but aimed by Juan at the neighbor's yard across the alley as EB already began running up the alley away from S. 14th St.

It must be noted the reasonableness of the defendant's beliefs must be determined from the standpoint of the defendant at the time of the defendant's acts.

If the jury had the benefit of an instruction of the "Castle Doctrine" presumption as applied to the facts of the case, the jury reasonably could not find the defendant guilty of all elements of Count 1 or 2 of this case beyond a reasonable doubt.

The withholding of MPO Ojdana's body cam video, even if unintentional, deprived the defendant of the knowledge

of a key witness, Amanda Bailey, whose testimony would answer the question of the jury of what happened before the use of deadly force as evidence of the reasonableness of the act per the "Castle Doctrine".

Amanda's testimony could have been used to impeach EB about his quick and uninvited entry towards Juan (i.e., arguably criminal trespassing per § 943.14, Wis. Stat. Note the annotation to *62 Atty. Gen. 16*, which specifies entering an outbuilding accessory to the main house may be a violation).

The failure to turn over the body cam video denied the defense knowledge of an eyewitness to support the self-defense claim. Amanda thought EB may have been involved in a carjacking of Juan. It was a *Brady* violation. It justifies a new trial.

The *State of Wisconsin Office of the Attorney General Model Policy and Procedure for Eyewitness Identification*, final draft 04-01-10, state on p. 2, ¶1, "Eyewitness evidence can be the most important and convincing evidence in a case."

Amanda Bailey's testimony was not cumulative. Amanda was an independent eyewitness and not the alleged victim nor the defendant in this case.

A defendant has a due process right to any favorable evidence "material either to guilt or to punishment" that is in the State's possession, *Brady*, 373 U.S. at 87, including any evidence which may impeach.

To not allow Amanda Bailey to testify at trial undermines the confidence in the outcome of the trial. *Kyles v. Whitley*, 514 U.S. 419, 434 (1995)

To be "favorable" to the defendant, the evidence must be either exculpatory or impeaching. *Carvajal v. Dominguez*, 542 F.3d 561, 566 (7th Cir. 2008)

A new trial is justified as a *Brady* violation due to newly discovered evidence or in the interest of justice, filed in this appeal after post-conviction proceedings per § 974.02, Wis. Stat.

The Supreme Court has stated, the real controversy has not been fully tried when "the jury was erroneously not given the opportunity to hear an important issue of the case." *State v. Hicks*, 202 Wis. 2d 150, 160, 549 N.W.2d 435 (1996) The court need not find a substantial probability of a different result to make this finding… A miscarriage of justice occurs if a defendant can show a substantial probability of a different outcome. *State v. Schumacher*, 144 Wis. 2d 388, 400-01, 424 N.W.2d 672 (1988). *State v. Henley*, ¶81, 2010 WI 97 (citations omitted).

Amanda Bailey's testimony is critical, distinguishing from *Henley* ¶82, because she was an independent eyewitness who said EB approached the van with an accelerated pace, uninvited, hood up and with Juan inside. It could have been a carjacking, Amanda said. Juan legally kept a gun in the work van for just such a case. The "Castle Doctrine" and the criminal trespass statute support his actions. EB himself said he went to confront Juan.

The fact that they were brothers (both admitted estranged) or if there was eye contact (Juan said no, EB said yes) has no impact on the reasonableness of Juan's actions under his privilege to defend himself and his property.

If the jury had been instructed that what happened before the use of deadly force informs the jury of the reasonableness of Juan's actions, combined with the clarification of the irrelevance of the relationship of Juan and EB and the disputed eye contact, it would create a substantial probability of a different result. See *Henley*, ¶83. Juan's 1st Degree Reckless Endangerment (Count 1), as a result, was a miscarriage of justice.

As to Count 2, 2nd Degree Reckless Endangerment, the Milwaukee Police Forensic Investigator confirmed Juan's version that the second and third shots were fired into the neighbor's year across from his driveway where the work van was parked next to the garage.

EB testified he was running up the alley away from the garage when he heard the shots, after a verbal exchange with Juan.

Juan testified these were "warning shots" and not "a risk of death or great bodily harm". See WIS JI-CRIMINAL 1347 (R28:5)

Further, Juan's actions were not "unreasonable" per WIS JI-CRIMINAL 1347, if Juan reasonably perceived threat to his person or property from EB who was trespassing with an intent to confront Juan. (R28:5)

As to sentencing, R62, the trial court failed to fully apply the *Gallion* standards, from 2004 WI 42, and the sentence was excessive.

Juan's character as a homeowner, professional electrician and family man shows his good character.

Finally, based on the above, the defendant seeks review as part of this appeal of the trial court's order to deny the defense motion for release on bond pending appeal (R83) or, in the alternative, to reverse the trial court's order not to reconsider the order of denial. (R108)

The alleged crimes as described in this appeal are acts of self-defense.

The defense appeals the denial of postconviction relief from and the denial of the motion for reconsideration of Juan Balderas' conviction in this case.

CONCLUSION

Juan Balderas woke up at home on the south side of Milwaukee with his regular plan to prepare and then go to work as an electrician.

He would leave the house that morning by the back door, enter his red work van parked along his stand-alone garage between his house and the alley, with the driver's side

along the garage. He legally kept a gun in his vehicle for safety both in his neighborhood and on job sites.

As he left home that morning his children and their mother were in the home. This appeared normal.

But Juan had an ongoing dispute with one of his brothers. It escalated before that day on Facebook.

His brother, EB, had decided to confront his older brother – over perceived insults and who their mother loved more and favored with financial support.

Emerging along the driver's side of the van from the alley, and unseen in the process per Juan, EB initiated a confrontation.

Both surprised and threatened, Juan reached for his weapon, to defend himself, his work van, his home and his family. He fired. EB was injured but survived. There was a jury trial on what happened. The State said Juan intentionally and

illegally used the weapon on his brother. Juan claimed self-defense.

The jury found Juan guilty. He is serving his sentence.

The defense, in post-conviction filings and hearings, identified an eyewitness to the confrontation. The trial judge, improperly the defense asserts, refused a new trial based on the new witness.

Based on that and other issues, the defense appeals his conviction, sentence, denial of post-conviction relief and respectfully request the Honorable Court to release Mr. Balderas on bond pending the appeal based on the likelihood of success of the appeal.

It is a fundamental right in this country and in English and European jurisprudence that a person has the right to defend life and property, as Juan did in this case.

EB's intent was clearly to confront his brother, as he testified at trial.

This is not a crime. Juan's conviction should be overturned.

Dated this 15th day of November, 2021.

Respectfully submitted,

Electronically signed by: Attorney Gary R. George

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8g)(a) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 7274 words.

Dated this 15th day of November, 2021.

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