STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2022AP002012-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MICHAEL ROSS STRAIGHT,

Defendant-Appellant-Petitioner.

PETITION FOR REVIEW

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ISSUES PRESENTED

Mr. Straight was convicted of one count disorderly conduct after a jury trial. He was acquitted on a battery charge related to the same underlying incident involving the same alleged victim, and on a separate count of disorderly conduct related to a different situation earlier the same day. At trial, although Mr. Straight's trial counsel requested a self-defense instruction as to the battery count, and Mr. Straight testified that everything he did in during the altercation was in self-defense, counsel failed to do so as to the disorderly conduct.

1. Was Mr. Straight denied the effective assistance of counsel when his attorney failed to request the "self-defense" instruction, WIS JI-CRIMINAL 800, as to the charge of disorderly conduct charge at issue?

The circuit court denied Mr. Straight's motion for a new trial. The court of appeals affirmed. In doing so, the court of appeals held that Mr. Straight failed to establish that his trial counsel performed deficiently.

2. Did trial counsel's trial strategy as to the disorderly conduct charge violate Mr. Straight's Sixth Amendment right to choose the objective of his defense when counsel overrode Mr. Straight's desire to claim self-defense and instead presented an invalid defense to the charge?

The circuit court denied Mr. Straight's motion for a new trial. The court of appeals affirmed, again holding that Mr. Straight failed to prove that trial counsel's strategic decision was legally invalid.

CRITERIA FOR REVIEW

In its decision, the court of appeals concludes that Mr. Straight failed to show that his trial counsel performed deficiently by failing to request a self-defense jury instruction. *State v. Straight*, No. 2022AP2012-CR, unpublished slip op. ¶¶1, 16-28 (WI App Aug. 24, 2023). (App. 4, 9-15). As a result, the court of appeals assumes without deciding, that self-defense is available when a defendant is charged with disorderly conduct. *Id.*, ¶16. (App. 9). As will be argued below, this issue is well-established in practice, although there is no legally-binding authority by this Court on the matter.

However, the court of appeals' opinion did not analyze the reasonableness of trial counsel's strategy, affirming on the basis that it believes a jury could have possibly agreed with trial counsel and critiquing Mr. Straight's argument that his trial counsel should have asserted self-defense. *Id.*, ¶16-28. (App. 9-15). Therefore, the opinion does not adequately address the threshold issue of whether counsel's "strategic decision" was objectively reasonable, or what a defendant must show to establish that his or her trial counsel's strategy was objectively unreasonable.

Thus, this Court should grant review to clarify what, in the context of a jury trial, a defendant must show in order to defeat the presumption that counsel's strategic decision was objectively unreasonable under *State v. Domke*, 2011 WI 95, 337 Wis. 2d 268, 805 N.W.2d 364, *State v. Felton*, 110 Wis. 2d 485, 329 N.W.2d 161 (1983), and *United States ex rel. Hampton v. Leibach*, 347 F.3d 219, 249 (7th Cir. 2003). Review is warranted as the issue presented is a significant question of constitutional law and is both novel and one which is likely to recur without guidance from this Court. Wis. Stat. § 809.62(1r)(a), (c). Further, review is warranted as the court of appeals' decision is "in conflict with controlling opinions of the United States Supreme Court," specifically *Strickland* and its progeny. Wis. Stat. § 809.62(1r)(d).

STATEMENT OF THE CASE AND FACTS

On October 8, 2021, Mr. Straight was at a friend's property when the alleged victim in this case, A.B., got out of her car, armed with a machete, and approached him.[1] (52:154, 191). Mr. Straight hit A.B., knocking her to the ground, and straddled her. (52:154-55, 157). He then wrestled the machete away from A.B., held her down, and raised the knife over her. (2:3; 52:155, 194). Mr. Straight's friend yelled at him to stop, and he got up, left the machete on the

[1] To protect the victim's privacy, this petition will refer to the victim using initials that do not correspond to her own. *See* Wis. Stat. § (Rule) 809.86(4).

ground near her, and walked away. (2:3; 52:155, 194, 196).

Before the trial, defense counsel filed proposed jury instructions requesting instruction 1220A – Battery: Self-Defense in Issue, and instruction 1900 – Disorderly Conduct. (26:2). Mr. Straight proceeded to a jury trial on January 21, 2022. (52:1). After jury selection, the circuit court addressed the issue of self-defense, asking defense counsel to briefly describe how self-defense was going to play into the circumstances of the case. (52:68). Defense counsel stated that the self-defense argument pertained only to the battery charge. (52:69).

The state called five witnesses: William Danehy, A.B., Eric Brechler, Matthew Whipple and Daniel Reuter. (52:4).[2]

Mr. Danehy testified that both he and Mr. Straight were at Eric Brechler's property on October 8, 2021. (52:108). Mr. Danehy was on the porch and Mr. Straight was in the yard when A.B. pulled up. Mr. Danehy saw A.B. walk toward Mr. Straight with a knife in her hand. (52:113). Then, Mr. Straight hit A.B. and knocked the knife and a bottle, which they later discovered to be Fireball whiskey, out of her hands. (52:110). He testified that he stood up to see what was going on over the porch railing, and saw Mr. Straight with the knife.

[2] The state also called the alleged victim in Count 1 to testify.

(52:111). Mr. Danehy then walked to the street to get the fire number and called the police. (52:110-11).

Next, A.B. testified that she had known Mr. Straight for about a month prior to the incident in question, and that she had been struggling with addiction and the death of her husband. (52:118-20). A.B. testified she did not remember the incident. (52:123). A.B. also did not remember telling the police that she had gotten in a fight with Mr. Straight or getting out of her car holding a knife, but knew that she had been in pain when she was at the hospital after the incident. (52:123, 127).

Mr. Brechler testified that Mr. Straight and A.B. had come to his property and although they were fine at first, they "got into it a little bit." (52:150-52). He testified that he saw Mr. Straight hit A.B. on both sides of the head and knock a bottle of liquor out of her hand. (52:152).

At some point after that,[3] Mr. Brechler saw A.B. come out of her car with a machete. (52:154). He stated that Mr. Straight "got enraged," grabbed A.B.'s wrist and "kind of spun her around and got her flopped on to the ground." (52:154). Mr. Straight took the machete away from A.B. and got on top of her. (52:154-55). Mr. Brechler began screaming Mr. Straight's name.

[3] Mr. Brechler first testified that Mr. Straight and A.B. left his property together after Mr. Straight hit her twice on the head and knocked the bottle out of her hand. (52:153-54). Mr. Brechler then testified that immediately after Mr. Straight hit A.B., she went to her vehicle and got the machete. (52:154).

(52:155). He saw Mr. Straight "turn the knife around . . . up above his head." (52:155). Then, after Mr. Brechler "storm[ed]" off his porch toward them to diffuse the situation, Mr. Straight dropped the machete. (52:155-56). A.B. retrieved the knife and took off in her car. (52:155).

The state then called two of the responding sheriff's deputies to testify, Matthew Whipple and Daniel Reuter. (52:163, 169). Deputy Whipple testified as to his conversation with A.B. when she was in an ambulance. (52:164). He described A.B. as having been crying and "pretty hysterical." (52:165). Whipple testified that A.B. told him, "her neck was squeezed" and it caused her pain. (52:165). Whipple observed some red marks on A.B.'s neck. (52:165). A.B. told Whipple at first that Mr. Straight "did it" and then later on that she wasn't sure who it was. (52:166). Whipple also recalled A.B. saying that she might have been in a vehicle crash and that she was "hurting everywhere." (52:167).

Sergeant Reuter testified that he interviewed Mr. Danehy and Mr. Brechler and confiscated several knives from A.B.'s car at the scene. (52:171). He also interviewed A.B. at the La Crosse County Jail the day following the incident, and she identified the "very large machete type knife" as the one she was holding at the time of the incident. (52:171). During his testimony, Reuter opened the knife to display it and then placed it back in its sheath. (52:172).

On cross examination, Reuter testified that the day was rainy and misty, that Mr. Danehy and Mr. Brechler would often drink on the porch, and that they had initially believed the bottle A.B. had was soda, not alcohol. (52:174-75). Reuter testified that Mr. Brechler's statement to law enforcement was that Mr. Straight and A.B. arrived back at the property separately prior to the confrontation with the knife. (52:176). A.B. told Reuter that she did not want to press charges against Mr. Straight and did not wish to be considered a victim. (52:177). In addition, A.B. told him that she had been using meth and weed, was detoxing from heroin, had a seizure the night before, and had no idea how her car got damaged. (52:178).

Mr. Straight was the sole defense witness at trial. (52:4). He testified that he was standing outside near the porch when A.B. got out of her vehicle with a bottle of Fireball and a machete and walked toward him. (52:191). A.B. was "saying stuff to [him] and then she hit [him] with the machete in the shoulder." In response, Mr. Straight stated that he "grabbed her," she swung at him again, and the two then went to the ground together. (52:192). He had injuries as a result of this interaction. (52:192). Mr. Straight testified that he did not physically assault or push A.B. down in any way prior to A.B. approaching him with the machete. (52:193). Mr. Straight also testified that he thought he was going to be "severely harmed" because the machete could kill you, and he "was in fear [for his] life." (52:193-94).

Mr. Straight also described what he did after getting the machete away from A.B. He testified, "I was on top of her, you know, and then I gave it back . . . ." (52:194). Mr. Straight explained that he took actions he believed necessary to defend himself against A.B. and "just tried to stop the attack from her." (52:194). Mr. Straight also testified that it was not his intention to harm A.B. (52:194).

At the jury instructions conference following the close of evidence, the circuit court addressed proposed changes to the pattern battery/self-defense instruction. (52:206-13). Trial counsel did not raise self-defense as to the disorderly conduct charge or request that the self-defense instruction be given generally as to Mr. Straight's interaction with A.B. (52:206-21). When the court brought up the combination battery and self-defense instruction, Mr. Straight attempted to speak to his attorney. However, trial counsel did not listen to him, and both trial counsel and the court told Mr. Straight that he should not be talking. (52:206). Ultimately, the self-defense instruction was given as to the battery count alone. (52:225-26; 41:10-14).

In its closing argument, the state described the disorderly conduct charge as follows:

> [D]isorderly conduct, what do we have here? We have the Defendant arguing with [A.B.]. People get in arguments. People who are in close relationships have disputes and arguments; that's one thing. But taking a machete that's 18 inches long and putting up against a woman's neck --

> sorry about that -- is not acceptable. This is not acceptable behavior.
>
> Is that the type of conduct that would tend to cause or provoke a disturbance? Absolutely. . . .
>
> And then to hold it like this, straddling the woman, and have this weapon in your hand pointed down at her in this very heated situation, that's not tolerated in society. Not only is it not right, it's illegal and you shouldn't be treating people that way.

(52:233-34). The state then reminded the jury that the self-defense instruction applied only to the battery charge. (52:234-35).

Trial counsel's closing argument focused primarily on the issue of self-defense. (52:247-49). As to the disorderly conduct charge, defense counsel argued that Mr. Straight was not guilty because it was A.B. who had behaved in a disorderly way and had provoked the resulting disturbance. Counsel also referenced the self-defense standard in the middle of his disorderly conduct argument.

> As far as the disorderly conduct, it's [A.B.] who's behaving in a disorderly way, who is provoking this disturbance, not Mr. Straight. So, he is entitled to defend himself, certainly, and those actions are privileged under Wisconsin law.
>
> And I would submit, ladies and gentlemen, that his actions weren't disorderly, that [A.B.]'s actions were. In fact, Mr. Straight committed no crime in

> what he was doing. Therefore, you should not convict him of a crime in that regard.

(52:249).

The jury found Mr. Straight guilty of disorderly conduct and not guilty of battery. (36, 37).

Mr. Straight filed a postconviction motion alleging ineffective assistance of counsel for failing to request the self-defense instruction as to both counts rather than battery alone. (56:1; App. 19). The circuit court instructed postconviction counsel to file a brief related to a threshold issue prior to scheduling a *Machner*[4] hearing. (58). Counsel filed a brief addressing the issues as requested by the court, and the court held a *Machner* hearing. (61; 72:1-3; App. 27-35, 36-38).

At the hearing, trial counsel testified that he did not intend to raise self-defense as to the disorderly conduct charge. (72:5; App. 40). Trial counsel explained he did not believe Mr. Straight had a valid self-defense claim as to the disorderly conduct because: "In self-defense you're entitled to terminate an unlawful interference with your person. But you're not entitled to retaliate once you've terminated the unlawful interference." (72:10; App. 45). He testified that he believed anything beyond Mr. Straight disarming A.B. became retaliation and was not force used to terminate the unlawful interference with his

[4] *State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

person because he believed the unlawful interference had ended. (72:10; App. 45).

Trial counsel's theory distinguished between the battery and the disorderly conduct. He believed that the disorderly conduct had begun only when the battery, and the associated claim of privilege, ended. (72:10-11; App. 45-46).

As to his closing argument, trial counsel explained that his statement related to self-defense in the middle of his argument on disorderly conduct referred back to the battery argument. (72:5-9; App. 40-44). He testified that it did not have to do with his disorderly conduct argument, despite occurring in the middle of the disorderly conduct argument. (72:5-9; App. 40-44).

Trial counsel testified that he knew that disorderly conduct and battery can occur simultaneously. (72:10-11; App. 45-46). He also stated that he had reviewed the self-defense jury instruction prior to trial, and was very familiar with it. (72:12; App. 47). Trial counsel understood that more than one person can be disorderly at the same time. (72:13; App. 48). He also agreed that an attorney cannot concede any element of a crime without the client's consent.

However, trial counsel elected to raise, as the sole defense to the disorderly conduct charge, that it was A.B. who had caused the disturbance. (72:13; App. 48). He believed this was a "more sophisticated" argument in light of his take on the evidence. (73:10,

11; App. 44, 45). This was because trial counsel did not believe that the jury would acquit Mr. Straight on self-defense, despite it being a complete defense to disorderly conduct. (72:12-13; App. 47-48). Trial counsel did not believe he had conceded any element of disorderly conduct, despite the defense he raised. (72:18; App. 53).

Trial counsel recalled the situation during the jury instructions conference at the close of evidence during which Mr. Straight attempted to talk to him. (72:18; App. 53). He did not recall what Mr. Straight was trying to say to him. (72:18-19; App. 53-54). However, trial counsel did recall that it was unimportant. (72:19; App. 54). He stated, "It was not important enough for me to recall what it was." (72:19; App. 54). He further testified, "I -- I spoke with Mr. Straight plenty. So, I think that was not the time for Mr. Straight to be bugging me about the trial." (72:19; App. 54). Trial counsel did not recall if he had asked Mr. Straight what he had wanted to say before the end of the jury instructions conference, but he did recall that, "It had nothing to do with any jury instructions." (72:19; App. 54).

Mr. Straight testified that he went to trial believing he could be acquitted on all charges. (72:21; App. 56). He believed he would be claiming self-defense as to both counts. (72:22; App. 57). Mr. Straight recalled attempting to talk to his trial attorney during the jury instructions conference. (72:22; App. 57). He testified that, "I was trying to ask him why the self-defense wasn't applying -- being

raised for the disorderly conduct, too." (72:22; App. 57). Mr. Straight further explained, "I was trying to make the -- with my lawyer. I mean, it's -- the lawyer is supposed to do what you want. And I wanted self-defense." (72:23; App. 58).

The circuit court concluded that trial counsel's strategy was not objectively unreasonable, and the strategy was owed great deference. (72:38; App. 73). Specifically, the court found that trial counsel's strategy was "that the defense to the disorderly conduct was that it was not Mr. Straight who committed the disorderly conduct." (72:40; App. 75). The court further analyzed, "It is a legitimate argument to a disorderly conduct to say we didn't cause the disturbance, she caused the disturbance." (72:40). Therefore, the court denied Mr. Straight's postconviction motion. (72:42; 68; App. 77, 79).

Mr. Straight appealed. The court of appeals affirmed, concluding that Mr. Straight failed to prove that his trial counsel's strategic decision as to the defense to the disorderly conduct charge was unreasonable. *Straight*, slip op. ¶27. (App. 14-15).

ARGUMENT

I. This Court should grant review and address what is necessary to establish that trial counsel's claimed strategic decision was not "objectively reasonable."

A. Mr. Straight is entitled to a new trial as he was denied the effective assistance of counsel.

Trial counsel's failure to raise self-defense, or any valid defense, fell below objective standards of reasonableness and rendered the outcome of the trial in Mr. Straight's case unreliable. As a result, Mr. Straight was denied the effective assistance of counsel and his conviction must be vacated.

Criminal defendants in Wisconsin are guaranteed the right to counsel by both the United States Constitution and the Wisconsin Constitution. *State v. Carter*, 2010 WI 40, ¶20, 324 Wis. 2d 640, 782 N.W.2d 695 (citing U.S. Const. amend. VI). The right to counsel includes effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). To establish ineffectiveness, a defendant must show that his counsel's performance was deficient and that he was prejudiced by that deficient performance. *Id*. at 687.

"There is a 'strong presumption that [counsel's] conduct falls within the wide range of reasonable professional assistance.'" *State v. Domke*, 2011 WI 95, 337 Wis. 2d 268, ¶36, 805 N.W.2d 364.

"Reviewing courts should be 'highly deferential' to counsel's strategic decisions" *Id.* (citing *State v. Carter*, 2010 WI 40, ¶22, 324 Wis. 2d 640, 782 N.W.2d 695).

However, the strategy must be reasonable to receive such deference. *See id.*, ¶¶36, 49. Reviewing courts "will not second-guess a reasonable trial strategy, but th[e] court may conclude that an attorney's performance was deficient if it was based on an 'irrational trial tactic' or 'based upon caprice rather than upon judgment.'" *Id.*, ¶49. Courts should not "ratify a lawyer's decision merely by labeling it . . . a matter of choice and of trial strategy." *State v. Felton*, 110 Wis. 2d 485, 502, 329 N.W.2d 161 (1983) (internal quotation omitted). "[A]n attorney's decisions are not immune from examination simply because they are deemed tactical"; the question is whether the tactic was objectively reasonable. *United States ex rel. Hampton v. Leibach*, 347 F.3d 219, 249 (7th Cir. 2003).

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

1. Trial counsel performed deficiently.

Mr. Straight testified that he acted in self-defense and received the instruction as to the battery count. Had trial counsel requested the jury

instruction as to the disorderly conduct against A.B. as well, the circuit court would have been required to give it, as Mr. Straight provided "some evidence" that he had acted in self-defense.

a. Defendants may claim self-defense when charged with disorderly conduct.

Self-defense was an available defense to Mr. Straight's disorderly conduct charge under the facts and circumstances. When deciding whether an instruction should have been provided, the question "is not what the 'totality of evidence' reveals but rather, whether a reasonable construction of the evidence viewed in the light most favorable to the defendant will support the defendant's theory." *State v. Peters*, 2002 WI App 243, ¶27, 258 Wis. 2d 148, 653 N.W.2d 300 (citing *State v. Mendoza*, 80 Wis. 2d 122, 153, 258 N.W.2d 260 (1977)).

"Self-defense" is an affirmative defense, and whether evidence supports the submission of this jury instruction is a question of law that an appellate court reviews de novo. *Peters*, 258 Wis. 2d 148, ¶12 (citing *State v. Mayhall*, 195 Wis. 2d 53, 57, 535 N.W.2d 473 (Ct. App. 1995). If trial counsel failed to request the appropriate instruction, the error is reviewed under the rubric of ineffective assistance of counsel. *See State v. Langlois*, 2018 WI 73, ¶49, 382 Wis. 2d 414, 913 N.W.2d 812.

The legislature established the right to self-defense as follows:

> A person is privileged to threaten or intentionally use force against another for the purpose of preventing or terminating what the person reasonably believes to be an unlawful interference with his or her person by such other person. The actor may intentionally use only such force or threat thereof as the actor reasonably believes is necessary to prevent or terminate the interference. The actor may not intentionally use force which is intended or likely to cause death or great bodily harm unless the actor reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself.

Wis. Stat. § 939.48(1). This statute, which is referred to as "perfect self-defense" is an affirmative self-defense to all crimes, except first-degree intentional homicide. The right to self-defense, as codified in § 939.48, applies, without limitation, to all crimes. However, the charged conduct must fall under the description of the privilege described in the statute—an individual "is privileged to threaten or intentionally use force against another."

A self-defense instruction must be given to the jury where a defendant has presented "some evidence" upon which a jury could find the defendant acted in self-defense. *See State v. Johnson*, 2021 WI 61, ¶17, 397 Wis. 2d 633, 961 N.W.2d 18. "A jury must be instructed on self-defense when a reasonable jury could find that a prudent person in the position of the

defendant under the circumstances existing at the time of the incident could believe that he was exercising the privilege of self-defense." *Id.* (quoting *State v. Stietz*, 2017 WI 58, ¶15, 375 Wis. 2d 572, 895 N.W.2d 796). This Court has described this benchmark as a "low bar," which is met even if the evidence is "weak, insufficient, inconsistent, or of doubtful credibility." *Id.* (citations omitted).

The definition of disorderly conduct is: "engag[ing] in violent, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly conduct under circumstances in which the conduct tends to cause or provoke a disturbance." Wis. Stat. § 947.01(1). When a person threatens or intentionally uses force against another, it in many circumstances could be described as conduct that is "violent, abusive, . . . profane, . . . or otherwise disorderly. . . ." *See id.*

In fact, the same course of conduct underlying a battery charge can also lead to a charge of disorderly conduct. The state brings charges of both battery and disorderly conduct for the same course of conduct in many cases, as it did here. *See, e.g.*, *State v. Kanarowski*, 170 Wis. 2d 504, 489 N.W.2d 660 (Ct. App. 1992) (holding that the state charging a defendant with multiple counts, including one count of battery and one count of disorderly conduct, all arising from one incident, is not multiplicitous).

Battery involves "caus[ing] bodily harm to another by an act done with intent to cause bodily harm to that person or another." Wis. Stat. § 940.19(1). Committing a battery, therefore, can also involve violent, abusive, otherwise disorderly conduct. It may also potentially include indecent, profane or boisterous behavior. Moreover, a battery can certainly be committed under circumstances in which the conduct tends to cause or provoke a disturbance, such as when others are present or may witness the conduct. Therefore, self-defense may be a defense to disorderly conduct, especially in cases in which the conduct underlying the charge also leads to a battery charge, or the conduct is violent, threatening, or abusive.

While there is no case on point as to the specific disorderly conduct statute at issue here—Wis. Stat. § 947.01(1)—, the this Court has explicitly held that self-defense is available in a prosecution for violation of a city ordinance prohibiting disorderly conduct. In *City of Stoughton v. Powers*, 264 Wis. 582, 60 N.W.2d 405 (1953), Powers was charged with violation of the following ordinance:

> Other Disorderly Conduct: Any person who shall be guilty of any noise, boisterous, or disorderly conduct, or any fighting . . . within the limits of the City of Stoughton, . . . shall be subject to a fine of not less than one dollar ($1.00) or more than one hundred dollars ($100.00) and in default of the payment thereof, by imprisonment in the Dane County Jail for not more than three months.

Id. at 584-85.

The court in *Powers* reversed the judgment and remanded the case for a new trial on the basis that Powers was "entitled . . . to all the defenses available to him, including self-defense." *Id.* at 588. This Court stated, "With respect to the trial court's refusal to instruct the jury on self-defense, we must hold that such refusal was prejudicial error." *Id.* Thus, in *Powers*, "[t]he issue of self-defense was raised by evidence offered by the [defendant] and was a proper subject for instructions." *Id.*

Therefore, our supreme court has held that a defendant may raise self-defense to a charge of disorderly conduct. Moreover, in *Powers*, the defendant was charged with disorderly conduct specifically for fighting, as Mr. Straight was in this case. Here, the state argued specifically that Mr. Straight had a verbal and physical altercation with A.B., for which the state contended he was guilty of disorderly conduct. Mr. Straight was therefore entitled to raise self-defense as to the disorderly conduct charge pursuant to *Powers*. The fact that *Powers* involved interpretation of a city ordinance rather than the criminal statute does not limit its applicability to Mr. Straight's case.

While there does not seem to be any Wisconsin Court of Appeals or Supreme Court opinion directly addressing whether the privilege of self-defense is available to defendants charged with disorderly conduct in violation of Wis. Stat.

§ 973.01(1), there are many unpublished cases that demonstrate that it occurs in practice. *See State v. Christen*, 2021 WI 39, ¶¶15, 18-19, 396 Wis. 2d 705, 958 N.W.2d 746 (in which the circuit court read a self-defense instruction on each count where defendant was charged with pointing a firearm at another, operating or going armed with a firearm while intoxicated, and disorderly conduct, and defendant raised self-defense); *State v. Brown*, No. 2014AP1848-CR, ¶6, unpublished slip op. (Wis. Ct. App. May 19, 2015) (discussing that jury was given the self-defense instruction as to disorderly conduct)[5]; *City of Stevens Point v. Tesch*, No. 2011AP2141, unpublished slip op. (Wis. Ct. App. Dec. 13, 2012) (defendant charged with violating a disorderly conduct ordinance with essentially the same language as Wis. Stat. § 947.01(1)) claimed self-defense); *State v. Lisney*, No. 00-2870-CR, unpublished slip op. (Wis. Ct. App. 2001), (defendant charged with disorderly conduct while using a dangerous weapon claimed self-defense at trial and received the jury instruction); *State v. Donnis J.*, No. 98-0821-FT (Wis. Ct. App. July 22, 1998) (juvenile defendant charged with disorderly conduct claimed self-defense and the defense was considered by the fact-finder); *State v. Hagge*, No. 86-626-CR, unpublished slip op. (Wis. Ct. App. Sept. 5, 1984) (reversing and holding that defendant was entitled to

[5] Pursuant to Wis. Stat. § (Rule) 809.23(3), unpublished, authored opinions issued on or after July 1, 2009, may be cited for persuasive value.

self-defense instruction as to disorderly conduct charge).

Further, no case precludes the use of self-defense to the disorderly conduct charge here. In *State v. Olsen*, 99 Wis. 2d 572, 299 N.W.2d 632 (Ct. App. 1980), the court of appeals considered whether self-defense, among other defenses, was available given that Olsen's charge of disorderly conduct involved only an act of blocking traffic. *Olsen*, 99 Wis. 2d at 573-74, 582. The court concluded that self-defense did not apply because Olsen had not used any force when he committed disorderly conduct. *Id.* at 579-80.

Mr. Straight's disorderly conduct charge (as to A.B.) involved an allegation of force. At closing, the state argued, that this charge of disorderly conduct arose from an argument between Mr. Straight and A.B., and involved force: "taking a machete that's 18 inches long and putting up against a woman's neck. . . . And to get her down on the ground and then put this knife, this machete, this 18-inch weapon up against close to her neck." (52:233). Therefore, the analysis in *Olsen*, that self-defense is not available as a defense to disorderly conduct charges that do not allege any force does not prevent Mr. Straight from raising self-defense to the disorderly conduct charge at issue here. Rather, the analysis in *Olsen* supports Mr. Straight's argument that self-defense is available as a defense to a disorderly conduct charge that involves evidence that "the defendant used force."

Given the multitude of examples of the jury instruction for self-defense being given in cases in which a defendant is charged with disorderly conduct—either for disorderly conduct alone, or a combination of charges—it seems the practice has been routine going back to at least 1984.

This Court should accept review and hold that self-defense is an available defense when a defendant is charged with disorderly conduct.

b. Trial counsel's strategy was not objectively reasonable.

Mr. Straight's trial counsel did not present a valid defense to the disorderly conduct charge. Trial counsel testified that he made a strategic decision not to raise self-defense as to the disorderly conduct charge. However, if counsel's decision was not reasonable, it does not receive deference as a strategic decision. *See Domke*, 337 Wis. 2d 268, ¶¶36, 49; *Felton*, 110 Wis. 2d at 502, *Leibach*, 347 F.3d at 249.

Trial counsel's decision not to pursue self-defense as to the disorderly conduct charge was unreasonable. First, there was no reason to distinguish between the battery and disorderly conduct charges. The two charges stemmed from a single course of conduct in which, after being threatened by A.B. with a machete, Mr. Straight knocked A.B. to the ground, got on top of her, wrestled the knife away from her, and held it over her before releasing her and returning the knife to her once he

believed he was safe. Mr. Straight testified at trial that he believed he was going to be "severely harmed" and "was in fear [for his] life." (52:193-94). In addition, trial counsel testified that he understood that a battery and a disorderly conduct can be committed simultaneously. (72:10-11; App. 45-46).

Although the state later argued in its closing that the disorderly conduct charge occurred after Mr. Straight got the machete away from A.B., the evidence still supported self-defense. Mr. Straight had testified "I was on top of her, you know, and then I gave it back . . . ." (52:194). He further testified that he took actions he believed necessary to defend himself against A.B. and "just tried to stop the attack from her." (52:194). And that "after that I didn't harm her." (52:194).

Second, a threatening act may be privileged under self-defense. The standard self-defense instruction provides that a defendant may "threaten or intentionally use force against another" if the following conditions are met: (1) the defendant believed that there was an actual or imminent unlawful interference with the defendant's person; (2) the defendant believed that the amount of force the defendant used or threatened to use was necessary to prevent or terminate the interference; and (3) the defendant's beliefs were reasonable. WIS JI-CRIMINAL 805.

The evidence therefore supports a conclusion that Mr. Straight, in holding the knife over A.B.: (1) threatened A.B. because he believed she posed an actual or imminent danger to himself; (2) believed it was necessary to do so to protect himself; and (3) his beliefs were reasonable. There was substantial testimony about the number of knives A.B. had in her possession during the incident.

Sergeant Reuter testified that he confiscated additional knives from A.B.'s car after responding to the scene. (52:171). A.B. testified that her deceased husband had given her knives for protection and probably had several knives on her that day. (52: 124). Mr. Straight testified that he lived next door to A.B. and traveled with her in her vehicle on the date in question. (52:185). It was reasonable for Mr. Straight to threaten A.B. by showing her that he could get a knife away from her and could use it against her, knowing that the machete was not the only knife she had on her that day.

Trial counsel's choice to instead raise the defense that A.B. was disorderly and had caused the disturbance was unreasonable, as it is not a defense to the charge. Although trial counsel testified that he did not believe it was a good practice to present multiple defenses or alternative defenses because, "that doesn't work with juries[,]" counsel ultimately did not present any legally sound defense to the disorderly conduct charge. (72:13; App. 48). Instead, he argued that A.B. was disorderly and was the cause of the disturbance, which is not a defense to disorderly conduct. (72:13;

App. 48). In addition, counsel muddied the waters by making a pseudo self-defense argument in his brief closing argument, claiming that Mr. Straight was privileged to act and "committed no crime in what he was doing." (*See* 52:249).

Trial counsel testified that due to his "more sophisticated" view of the evidence, he did not believe that self-defense was a defense to the charge. Specifically, trial counsel testified that he had determined that Mr. Straight's actions had crossed into retaliation, and he was no longer acting in self-defense, when he held the knife above A.B. (72:10; App. 45). Trial counsel believed this was the point that the battery stopped and the disorderly conduct began. (72:10; App. 45).

However, trial counsel ignored significant evidence when he made this overly-simplistic conclusion. Mr. Straight testified that everything he did was in self-defense. He did not intend to hurt A.B., and he was in fear for life and safety. (52:193-94). He stopped as soon as the threat was extinguished. (52:194). In addition, A.B. had multiple knives in her possession—not just the one machete she had wielded against Mr. Straight. Threatening another person in order to stop an unlawful interference is also privileged under the self-defense statute. Wis. Stat. § 939.48(1). And at most, Mr. Straight threatened A.B. with the knife immediately upon getting it away from her. Another view of the evidence is that Mr. Straight simply held the knife up out of A.B.'s reach so that she could not try to get it back.

A number of arguments are possible, and trial counsel failed to think through these possibilities. He refused to consider any view of the evidence other than his initial conclusion prior to the presentation of evidence at trial—which was that Mr. Straight had retaliated in the split second after he got control of the knife because the threat posed by A.B. was completely extinguished at that point. (72:10; App. 45). That is not a realistic or reasonable view of the evidence.

Thus, as a result of trial counsel's belief that his view was the most sophisticated, he failed to analyze the evidence in light of the self-defense instruction. Trial counsel unreasonably took the decision out of the jury's hands. Therefore, trial counsel's decision as to which defense to present to the jury was the result of caprice and conceit, not judgment, and it is not due the deference of a strategic decision. *See Felton*, 110 Wis. 2d at 501 (citing *State v. Harper*, 57 Wis. 2d 543, 553, 205 N.W.2d 1 (1973) (emphasizing the duty of a lawyer to investigate adequately the circumstances of the case and to explore all avenues which could lead to facts that are relevant to either guilt or innocence, and specifically adopting sec. 4.1 of the American Bar Association Standards Relating to The Prosecution Function and The Defense Function, which provides, "It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to guilt and degree of guilt or penalty.").

Trial counsel's choice to reject self-defense, a complete and valid defense to the charge, was also unreasonable given the supposed defense that counsel presented instead. The defense trial counsel described at the *Machner* hearing was not a defense to the disorderly conduct charge. Trial counsel testified that the defense he presented to the jury was that A.B. was disorderly and was the cause of the disturbance. (72:13; App. 48). This is not a defense to disorderly conduct because more than one person can be disorderly at the same time, and it is not necessary that the defendant's actions even cause a disturbance to constitute disorderly conduct.

This much is clear from the second element of the disorderly conduct jury instruction. WIS JI-CRIMINAL 1900 ("It is not necessary that an actual disturbance must have resulted from the defendant's conduct."). Nor is it necessary that it be the *only* cause, if a disturbance is in fact ensues. *See State v. Zwicker*, 41 Wis. 2d 497, 506, 519, 164 N.W.2d 512 (1969) (reviewing a case in which multiple defendants were convicted of disorderly conduct for the same event). Therefore, multiple people can be guilty of disorderly conduct at the same time. *See id.*

Even where the defendant is provoked into fighting or yelling an insult by another individual, the defendant's conduct can still be such that it tends to cause a disturbance. The question is not only what is proper in response to some provocation, but what type of behavior society might expect in the general location, time of day, etc.

For example, in Mr. Straight's case, the state argued that despite the self-defense argument as to the battery charge, Mr. Straight was guilty of disorderly conduct because his behavior was unacceptable in society and actually did cause a disturbance. (52:233-34). Therefore, despite the defense's argument that it was A.B. who provoked the disturbance and behaved in a disorderly way and not Mr. Straight (52:249), there was nothing preventing the jury from concluding that Mr. Straight's actions also amounted to disorderly conduct.

As the Court and the state made clear at trial, self-defense did not apply to the jury's consideration of the disorderly conduct charge. (52:223-226, 234-35). As a result, the question before the jury was whether Mr. Straight's conduct was violent, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly conduct under circumstances in which the conduct tends to cause or provoke a disturbance, without regard to self-defense. (*See* 41:10; 52:223-226, 234-35).

Therefore, this court should accept review and hold that Mr. Straight was entitled to a self-defense instruction as to the disorderly conduct charge, and that it was unreasonable not to request the instruction. In fact, the circuit court found that it would have given the self-defense instruction as to the disorderly conduct count had it been requested. (72:39; App. 74). By failing to request the instruction, trial counsel took the question from the jury and deprived Mr. Straight of a valid defense.

c. Trial counsel's deficient performance prejudiced Mr. Straight.

Defense counsel's deficient performance was prejudicial and denied Mr. Straight the right to a fair trial. The jury, having heard Mr. Straight's testimony and received the self-defense instruction, acquitted Mr. Straight of the alleged battery of A.B. Had trial counsel requested the jury instruction as to the disorderly conduct against A.B. as well, the circuit court would have been required to give it, as Mr. Straight provided "some evidence" that he had acted in self-defense.

Due to trial counsel's failure to request the instruction, the jury heard that self-defense was not an issue—and therefore that they must ignore the evidence of self-defense—when it came to the disorderly conduct charge. The battery charge against Mr. Straight came down to the jury deciding whether he was acting in self-defense when he interacted with A.B., hit her, rolled to the ground with her, took the machete from her, held it over her, and then ultimately got off of her and gave her the knife back.

Mr. Straight was acquitted of the count in which the jury was instructed on self-defense, and the disorderly conduct charge arose out of the same course of conduct. Therefore, it follows that the jury would have found that Mr. Straight acted in self-defense with regard to the disorderly conduct charge as well, had they received the appropriate instruction.

Therefore, Mr. Straight was prejudiced by trial counsel's failure to request the self-defense jury instruction on the disorderly conduct charge.

II. This Court should grant review and address whether trial counsel's failure to present a valid defense—when one existed—violated Mr. Straight's Sixth Amendment right to choose the objective of his defense and maintain his innocence.

A. Legal principles and standard of review.

Under the Sixth Amendment's guarantee of the assistance of counsel, trial counsel cannot admit a client's guilt at trial over the client's express desire to maintain his innocence. *McCoy v. Louisiana*, 138 S. Ct. 1500, 1505 (2018).

In *McCoy*, McCoy was charged with three counts of first-degree murder. *Id*. at 1506. McCoy maintained his innocence and asserted that he was out of the state when the murders occurred and that corrupt police killed the victims. *Id*. Despite McCoy's asserted defense, trial counsel concluded that the evidence against him was "overwhelming and that, absent a concession at the guilt stage that McCoy was the killer, a death sentence would be impossible to avoid at the penalty phase." *Id*. Therefore, trial counsel told McCoy that he planned to concede at trial that he committed the murders. *Id*. In response, McCoy told his attorney not to make the concession and to argue he was innocent. *Id*. Even so, trial counsel told the

jury, during opening and closing statements, that the only reasonable conclusion from the evidence was that McCoy committed the murders. *Id*. at 1506-1507. Unsurprisingly, the jury convicted McCoy of three counts of first-degree murder. *Id*. at 1507.

The United States Supreme Court determined that the "[a]utonomy to decide that the objective of the defense is to assert innocence belongs" to the defendant, and that this determination is not a strategic decision for trial counsel. *Id*. at 1508. The Court held that "[w]hen a client expressly asserts that the objective of his [defense] is to maintain innocence of the charged criminal acts, his lawyer must abide by that objective and may not override it by conceding guilt." *Id*. at 1509. Accordingly, the Court found that defense counsel violated McCoy's Sixth Amendment rights when he conceded McCoy's guilt at trial. *Id*. at 1510.

A client's rights under the Sixth Amendment to make "certain decisions regarding the exercise or waiver of basic trial rights are of such moment that they cannot be made for the defendant by a surrogate." *Florida v. Nixon*, 543 U.S. 175, 187 (2004). These decisions include "whether to plead guilty, waive the right to a jury trial, testify in one's own behalf, and forgo an appeal." *McCoy*, 138 S. Ct. at 1508. The *McCoy* Court decided that "[a]utonomy to decide that the objective of the defense is to assert innocence" also belongs in that category, as opposed to being in the realm of "[t]rial management," which is "the lawyer's province[.]" *Id*. The Court explained that such

decisions "are not strategic choices about how best to achieve a client's objectives; they are choices about what the client's objectives in fact are." *Id*.

Typically, to gain redress from attorney error, a client must show prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). However, when the attorney admits a client's guilt over the client's express objection at trial, the error is "structural" and prejudice does not need to be shown. *McCoy*, 138 S.Ct. at 1510-1512. This Court "independently reviews whether deprivation of a constitutional right has occurred." *State v. Chambers*, 2021 WI 13, ¶13, 395 Wis. 2d 770, 955 N.W.2d 144.

B. This Court should accept review and hold that trial counsel overrode Mr. Straight's objective to maintain his innocence when he opted to raise a legally invalid defense to the disorderly conduct charge.

Mr. Straight testified that his defense objective was to assert his innocence as to all claims, and that he believed his defense to both claims was self-defense. (72:21-22; App. 56-57). Mr. Straight's trial testimony supports a self-defense claim, and the circuit court found that it would have given the self-defense instruction on the disorderly conduct charge had it been requested. (72:39; App. 74). However, trial counsel instead chose to raise an invalid defense, but still allowed Mr. Straight to testify as to self-defense.

The only defense trial counsel presented as to the disorderly conduct was that the alleged victim, A.B., was disorderly and caused the disturbance. (52:249; 72:8-9, 13; App. 43-44, 48). While trial counsel believed this was a "more sophisticated" view of the facts, he ultimately failed to raise any valid defense to disorderly conduct. (*See* 72:10-11; App. 45-46). In arguing this illogical defense, trial counsel implicitly conceded that Mr. Straight was guilty.

Arguing that another individual was disorderly or caused a disturbance is not a defense to disorderly conduct. The disorderly conduct instruction given to the jury in Mr. Straight's case, which is substantially similarly to the standard jury instruction, demonstrates that the jury could not find Mr. Straight not guilty based on A.B.'s conduct. Nothing in the jury instruction told the jury to examine A.B.'s behavior, or that they should consider whether another person caused a disturbance. (41:10-11). In fact, the elements do not require that a disturbance was caused at all.

The circuit court erred in concluding that trial counsel did not concede the disorderly conduct to the jury. The court found that trial counsel "did articulate that the defense to the disorderly conduct was that it was not Mr. Straight who committed the disorderly conduct." However, this is not a defense to the charge. The jury instruction does not contemplate that there is a single disorderly conduct that can occur in any particular situation and a jury can conclude that only one person committed the crime. *See*

WIS JI-CRIMINAL 1900 (42:10-11). Nor does the instruction contemplate that another person causing a disturbance has any bearing on whether another person was also disorderly.

Trial counsel's closing argument as to the disorderly conduct charge demonstrates that A.B.'s conduct had no bearing on whether the state met its burden to prove the elements. The entire argument was:

> As far as the disorderly conduct, it's [A.B.] who's behaving in a disorderly way, who is provoking this disturbance, not Mr. Straight. . . .
>
> And I would submit, ladies and gentlemen, that his actions weren't disorderly, that [A.B.]'s actions were. In fact, Mr. Straight committed no crime in what he was doing. Therefore, you should not convict him of a crime in that regard.

(52:249). Although trial counsel stated that Mr. Straight did not commit a crime, counsel failed to analyze the facts that the jury heard during the trial or apply them to the elements. (*See* 52:249). In fact, trial counsel did not mention the elements of disorderly conduct at all. (*See* 52:249).

In addition, trial counsel elicited Mr. Straight's testimony as it related to self-defense during the interaction at issue. In doing so, trial counsel allowed Mr. Straight to essentially concede that he carried out the actions the state accused him of, but that he was doing so in self-defense. Therefore, when trial counsel rejected Mr. Straight's desired defense as to the

disorderly conduct, failed to request the self-defense instruction and then failed to argue a valid defense to the jury, counsel conceded that the evidence met the elements of disorderly conduct. Under these circumstances, trial counsel conceded Mr. Straight's guilt.

Trial counsel conceded Mr. Straight's guilty over his objection. At the close of evidence, when the circuit court held the jury instructions conference, Mr. Straight told his trial attorney that he wanted to claim self-defense as to the disorderly conduct. (72:22; App. 57). However, trial counsel refused to listen to Mr. Straight because, as he testified, he believed he had already spoken to Mr. Straight enough, and he didn't allow Mr. Straight to bug him about the trial any more. (72:19; App. 54). Mr. Straight testified that he believed his defense to both counts was going to be self-defense. (72:21-22; App. 56-57). He did not wish to concede guilt to any charge. (72:21-22; App. 56-57).

Trial counsel therefore violated Mr. Straight's Sixth Amendment right to choose the objective of his defense. *Chambers*, 395 Wis. 2d 770, ¶18 ("A lawyer violates that autonomy '[w]hen a client expressly asserts that the objective of his defence is to maintain innocence of the charged criminal acts' and the lawyer acts contrary to that objective." (quoting *McCoy*, 138 S.Ct. at 1509)).

CONCLUSION

Mr. Straight respectfully requests that this Court grant review, provide clarity regarding the strategic reason exception to ineffective assistance of counsel, and vacate his conviction in this case due to ineffective assistance of counsel and the violation of his Sixth Amendment right to choose the objective of his defense.

Dated this 25th day of September, 2023.

Respectfully submitted,

Electronically signed by
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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this petition conforms to the rules contained in s. 809.19(8)(b), (bm) and 809.62(4). The length of this petition is 8,485 words.

CERTIFICATION AS TO APPENDIX

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

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

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

Dated this 25th day of September, 2023.

Signed:
Electronically signed by
Laura M. Force
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