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CLERK OF WISCONSIN
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STATE OF WISCONSIN
COURT OF APPEALS

DISTRICT III

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

Case No. 2023AP02013-CR

TOMMY JAY CROSS,

Defendant-Appellant.

ON NOTICE OF APPEAL FROM A JUDGMENT OF CONVICTION AND
DECISION AND ORDER DENYING POST CONVICTION MOTION
ORDERED AND ENTERED IN BROWN COUNTY CIRCUIT COURT, THE
HONORABLE JUDGE TAMMY JO HOCK PRESIDING

DEFENDANT-APPELLANT'S BRIEF

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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

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DEFENDANT-APPELLANT'S BRIEF

ISSUES PRESENTED

I. DID THE TRIAL COURT ERR BY INSTRUCTING THE JURY THAT CROSS WAS NO ENTITLED TO ACT IN DEFENSE OF MCGREW IF CROSS PROVOKED AB'S ATTACK ON MCGREW?

The trial court answered this question in the negative.

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II. WAS CROSS'S COUNSEL INEFFECTIVE BY HIS FAILURE TO IMPEACH AB WITH AB'S PRIOR CONVICTIONS?

The trial court answered this question in the negative. It held that any deficient performance did not affect confidence in the outcome of the case.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not requested as the defendant-appellant (Cross) believes the briefs of the parties will fully meet and discuss the issues on appeal.

Publication is not appropriate as the issues in this case are fact-specific and not of general interest to the administration of justice. Further, the issues involve little more than the application of well-settled rules of law to a unique fact situation.

The issues will be decided on the basis of controlling precedent and no reason appears for questioning or qualifying the precedent. Sec. 809.23(1), Wis. Stats..

STATEMENT OF THE CASE

The above matter was commenced on June 1, 2021 by the filing of a criminal complaint (2) charging the defendant-appellant (Cross) with one count of first degree reckless injury with a dangerous weapon contrary to Secs.. 940.23(1) (a), and 939.63(1)(b) , Wis. Stats. (Count One). The offense was alleged to have occurred on May 27, 2021. Attorney David Hassel was retained to

represent Cross (19). On June 21, 2021, Cross was bound over following a preliminary examination (180). The State, represented by Assistant District Attorney (ADA) Caleb J. Saunders, filed an information (26) containing the same offense as in the complaint. Cross entered a not guilty plea at his arraignment (172) on August 5, 2021. Status hearings and motion hearings were held thereafter (173-176, 99, 177). On October 11, 2021, the State filed an amended information (61) which added a count of first degree recklessly endangering safety with a dangerous weapon contrary to Secs. 941.30(1) and 939.63(1)(b), Wis. Stats. as Count Two. On February 1-3, 2021, a jury trial was held (168-170) which resulted in a verdict (107) of guilty on both counts of the information.

The court ordered a pre-sentence investigation (106) which was later filed (151). On April 15, 2022, Judge Tammy Jo Hock imposed concurrent sentences of twelve years initial confinement (IC) and eight years extended supervision (ES) on Count One and two years IC and two years ES on Count Two (171; 156, App. 101-102). Cross subsequently filed a notice of intent to pursue post-conviction relief (158) and the undersigned attorney was appointed to represent Cross (164).

On April 24, 2023, Cross filed a motion for post conviction relief (188; App. 117-136). The court held hearings on June 15, 2023 (220) and July 13, 2023 (209). After further briefing from the parties (199 and 200), the court issued a decision and order denying the post conviction motion (208; App. 103-116). On

October 26, 2023, Cross filed a notice of appeal¹ (210) directed at the judgment of conviction and decision and order denying the post conviction motion.

STATEMENT OF FACTS

A. Testimony at jury trial

The jury trial in this case took place on February 1-3, 2021. The victim will be referred to by his initials (AB) to protect his identity as required by Rule 809.86(1). . Immediately before trial, ADA Saunders indicated that the parties agreed that AB had five convictions for impeachment purposes (168: 9).

Officer Logan Rueckl of the Green Bay Police Department testified that on May 27, 2021, he was dispatched to American Foods where he observed a large group in the parking lot (168: 80). AB was on the ground with injuries (168: 80-81). Jenee Walker, AB's girlfriend, was present (168: 81). Rescue personnel applied a tourniquet to AB's leg and took AB away (178: 82-83). AB stated that he had a gun in his vehicle (168: 84).

Yury Berumen-Guzman, an employee at American Foods, testified that she was in the parking lot when she saw a truck strike AB (168: 67). AB was screaming that he could not feel his leg (168: 67). Then she heard some shots (168: 89).

¹The paging of the record (222: 4) misidentified the notice as a :no merit notice of appeal. It was not.

Officer Karen Pineda testified that on May 27, 2021 she responded to American Foods where she did a pat down of the injured male and did not find any weapons (168: 94).

Detective Jason Leick testified that he reviewed a video (221: Exhibit Two) from American Foods (168: 98). Shenelle McGrew was in a white vehicle (168: 99). AB and Ms. Walker were also there and near AB's vehicle (168: 100-101). Leick also obtained a warrant to extract data from Cross's cell phone (168: 103). Exhibit 3 (120) was the extraction report (168: 104). McGrew sent Cross a text stating that her day was going bad (168: 105). Cross replied stating "fuck dude bitch ass" after McGrew complained that someone was trying to crack jokes (168: 106). Then Cross asked McGrew if she wanted him to come up there (168: 106). There were then some texts about the situation and Cross indicated he was on his way (168: 107-108). McGrew told Cross she did not want to get Cross in trouble (168: 108). At 10:05 p.m. there was a 9 minute and 23 second phone call (168: 129). There were no calls to 911 or completed calls to others (168: 110).

In the video, there was also a fight between two people and AB appeared to have something in his right hand that was extended (168: 113).

AB testified that he was 39 years old and was a forklift scanner at American Foods prior to the incident (168: 135-136). He worked until 10:00 p.m. on May 27, 2021 (168: 139). Right after AB punched out, McGrew told AB that if he had something to say to say it to her face (168: 140). McGrew also stated that her boyfriend was coming to "fuck him up" (168: 140, 162). AB sat to calm

down and then exited the building with Walker (168: 141-145). As they were walking through the parking lot, McGrew ran across the parking lot and punched AB in the face multiple times (168: 148, 164-165). Then there was a scuffle with all three after which Walker started fighting with McGrew (168: 147, 165). Then AB broke up the fight but as AB was walking away Cross was coming in with his vehicle (168: 148). AB was on the driver side of his truck (168: 149). The engine was revving up (168: 151). Cross tried to hit AB and broke the wheel well on the driver side of AB's vehicle (168: 151). AB was hit in the leg and knocked on the ground (168: 151, 173; just before 22:11:54 on Exhibit Two).² Walker was by the driver back door (168: 152). After getting off of the ground, AB went into the vehicle and grabbed his gun from the passenger side of the vehicle (168: 152, 181; just before 22: 12:24 of Exhibit Two). Then AB pointed the gun at Cross who backed up (168: 154, 155, 167, 169, 181; just before 21: 12: 27 on Exhibit Two). Then AB tried to break up the fight between Walker and McGrew but put the gun in his hoodie and did not point a gun (168: 154, 156, 170, 172, 182;). As AB was doing that, Cross came back full speed and took AB's left leg (168: 154, 157, 172, 190). AB denied using the gun to hit anyone (168: 156-157).

As AB saw Cross's reverse lights, AB started to put a bullet in the chamber and shot seven times (168: 158, 160, 183-185). He had Walker put the gun in the car (168: 161).

²This portion of the incident was Count Two which will be referred to in this brief as "the first hit." Count One, which was the offense during which AB lost a leg, was the "second hit."

Raeleigh Andrae, a Green Bay police forensics investigator, testified that a team member and her took DNA swabs from a vehicle on 413 Cass Street and took photographs (168: 198-199).

Jenee Walker testified that she left American Foods with AB who informed her that McGrew was talking about doing something (168: 206, 225). As they walked towards AB' vehicle, McGrew jumped out of her vehicle and got in AB's face but not Walker's (168: 209, 229-230, 232). AB and McGrew started fighting (168: 209). AB moved Walker out of the way and Walker hit McGrew trying to break AB and McGrew up (168: 210). After everyone separated, AB and McGrew went toward Walker's truck (168: 211). Then a vehicle came out of nowhere and hit AB (168: 211). McGrew was across the parking lot at the time (168: 213). After the first hit, AB got his gun out of the car and McGrew and Walker were fighting (168: 214). In the second hit after Cross backed up, he hit AB and split AB's leg open while Walker and McGrew were fighting (168: 215). Walker did not see AB with a gun (168: 215, 223-224). AB's truck was shaken by the collision with Cross's truck (168: 216-217).

After the second hit, Cross shot his gun three times and had Walker put it back in his truck (168: 216-217, 228). Cross hit AB with Cross's vehicle three times (168: 217, 220-223). AB went into shock and Walker performed CPR (168: 219). Between hits, Cross was doing donuts (168: 223).

Kristen McMullen, a Green Bay forensic specialist, testified that on May 27, 2021 she took photographs (127-131; Exhibits 10-17) of the scene (168: 236-244).

Roger Beilke, a foreman at American Foods, testified that on May 27, 2021 he saw an argument between AB and McGrew (169: 8). McGrew stated that she was going to get someone as a threat so Beilke pulled AB away and told him to chill (169: 9). McGrew left (169: 10). AB waited for Walker to leave with him (169: 13, 16). McGrew was having issues with several employees (169: 15). .

Josefina Bautista, a trainer at American Foods, testified that he also saw an argument between McGrew and AB in the staircase where she heard AB state that McGrew should call her boys as AB was not scared (169: 19). Afterwards, AB sat down in the lunchroom (169: 20).

Detective Kevin Kempf testified that Cross's vehicle was a blue Ford at 413 Cass Street (169: 26). There were shell casings on the parking lot at American Foods (169: 33-41). On the video, McGrew's vehicle left the north parking lot and pulled into the lot where AB's vehicle was parked (169: 46-47). Cross's vehicle entered the parking lot on the video at a high rate of speed (169: 49). It went directly toward AB's vehicle (169: 49). In the video of the parking lot, there was an altercation with AB, McGrew and Walker where they separated (169: 51-52). At 22:12:06 Cross's vehicle appeared to drive into AB (169: 52, 72). Cross was shot in the incident (169: 79). AB was hit twice with a vehicle (169: 81). The second strike caused damage to Cross's vehicle which had

biological material on it (169: 80-81). Cross's vehicle was facing AB when AB shot at it (169: 86). Only one shot was to the back of Cross's vehicle (169: 68).

Shenelle McGrew testified that on May 27, 2021 she left her shift a little early and AB called her a bitch (169: 106, 115, 131). AB told McGrew to leave Walker alone (169: 115). While Walker was in the cafeteria, AB said he was going to have his sisters jump McGrew (169: 116, 136). AB followed McGrew down the stairs and mentioned Black Disciples (169: 116-117, 137). McGrew went to her car and moved it to the lot where security was and employees exited the building (169: 118, 143). McGrew wanted to talk to Walker and called Cross (169: 119). McGrew told Cross that she had been threatened and that she want to talk to Walker about it (169: 119). Cross tried to calm her down (169: 120, 145). When McGrew saw Walker she ended the phone conversation (169: 120, 145).

When McGrew walked up to Walker she told her to tell AB to leave her alone and AB spit on her so they started fighting (169: 120-121, 148-149). AB grabbed McGrew's wig and jumped her (169: 150). Walker and AB went toward AB's car and McGrew stayed by her car (169: 122). Cross's car pulled in close to AB and Walker (169: 123). AB pulled a gun out at Cross (169: 123, 156). Cross backed up (169: 124). AB stated, "What's up now, bitch ass nigger?" (169: 125). Walker also stated "yeah you ain't so tough now and swung a box cutter at McGrew (169: 125). AB walked around and hit McGrew in the face with the gun and stated, "I'll kill this bitch" (169: 125-126, 167-168). When Cross first arrived, he pulled close to AB and McGrew was several car lengths away (169:

155). Then McGrew heard Cross's car and AB screaming (169: 126). McGrew did not see it because she was fighting with Walker (169: 164). Then McGrew heard gunshots and ran toward Cross's car (169: 126). Cross had been shot and drove to the hospital with McGrew (169: 127).. The cut on McGrew's head on Exhibit 24 (141) was from AB's gun, not from being punched (169: 128, 152). AB hit her with the gun after pointing it at Cross before pointing the gun at her (169: 130, 158). McGrew had been convicted of a crime six times (169: 169).

Cross testified that she got a call from McGrew in which McGrew was very emotional (169: 179). McGrew told Cross that AB had approached her and claimed he would have his sisters jump McGrew and referred to the Black Disciples (169: 180, 200, 206). While in his vehicle on the way to American Foods, Cross heard a scuffle on the phone (169: 181, 183). Cross was concerned McGrew was getting her butt kicked from what he heard on the phone (169: 182, 201). Once Cross got to American Foods, he saw AB and Walker by his truck and quickly pulled real close to AB (169: 183, 208, 212). Cross thought he might have bumped AB (169: 184-185, 209). Cross yelled to McGrew that they should go but McGrew and Walker were in a scuffle (169: 185-186). Then AB appeared from the passenger side of his truck and pointed the gun at Cross's head (169: 186, 213). Then Cross put the car in reserve and backed up 6-8 feet (169: 186). Next Cross saw AB walk to where McGrew and Walker were fighting and struck McGrew with the gun (169: 187, 213-214). Then AB pointed the gun and stated "I'll kill this bitch" (169: 187, 214, 231). Cross feared for McGrew's life and put

the car in drive (169: 187-188). Cross intended to stop AB, not kill him (169: 189). Cross feared for his life and McGrew's (169: 216). After striking AB, Cross turned around to pick up McGrew (169: 189-192). The Cross heard some shots and Cross left and was hit twice (169: 182-183 218). McGrew reached Cross's car, got in, and Cross drove to the hospital (169: 194, 218). Cross was shot in his right chest and left wrist (169: 195). Cross was convicted of a crime eight times (169: 219-220).

During the jury instruction conference, the court held there was no basis for a defense of other instruction on Count Two (169: 254-255). As to defense of others on Count One, ADA Saunders argued that the first hit was provocation by Cross (169: 260). Attorney Hassel argued that the second drive and hit was provoked by AB getting and using his gun (169: 261). AB pointing the gun severed the relationship between the two incidents by pointing the gun at Cross who backed off (169: 262). The court commented that the confrontation in the cafeteria by McGrew might be provocation (169: 263-264). Hassel also argued that Cross had the right to act in defense of others even if he provoked the attack if the attack was on a third person such as McGrew (169: 273-276). Hassel and Saunders disagreed on whether Cross could defend McGrew if Cross provoked the incident by the first strike on AB (169: 305-306). The State wanted the jury instruction to state that Cross was not privileged to use deadly force in response to threat to McGrew if Cross provoked the attack (169: 308-310). The court approved, over Hassel's objection, an instruction on provocation as related to

defense of others that did not allow it if Cross provoked the attack (169: 311). The jury instruction given by the court on defense of others as to Count One was the following:

Defense of Others

Defense of others is an issue in this count. The law of defense of others allows the defendant to threaten or intentionally use force to defend another only if:

- the defendant believed that there was an actual or imminent unlawful interference with the person of Shenelle McGrew; and,
- the defendant believed that Shenelle McGrew was entitled to use or to threaten to use force in self-defense; and,
- the defendant believed that the amount of force used or threatened by the defendant was necessary for the protection of Shenelle McGrew; and,
- the defendant's beliefs were reasonable.

The defendant may intentionally use or threaten force which is intended or likely to cause death or great bodily harm only if the defendant reasonably believed that the force used was necessary to prevent imminent death or great bodily harm to Shenelle McGrew.

Determining Whether Beliefs Were Reasonable

A belief may be reasonable, even though mistaken. In determining whether the defendant's beliefs were reasonable the standard is what a person of ordinary intelligence and prudence would have believed in the defendant's position under the circumstances that existed at the time of the alleged offense. The reasonableness of the defendant's beliefs must be determined from the standpoint of the defendant at the time of his acts and not from the viewpoint of the jury now.

Retreat

There is no duty to retreat. However, in determining whether the defendant reasonably believed the amount of force used was necessary to prevent or terminate the interference, you may consider whether the defendant had the opportunity to retreat with safety, whether such retreat was feasible, and whether the defendant knew of the opportunity to retreat.

Provocation

You should consider whether Shenelle McGrew provoked an alleged attack of her. A person who engages in unlawful conduct of a type likely to provoke others to attack, and who does provoke an attack, is not allowed to use or threaten force in self-defense against that attack.

However, if the attack which follows causes the person reasonably to believe that the person is in imminent danger of death or great bodily harm, the person may lawfully act in self-defense.

But the person may not use or threaten force intended or likely to cause death or great bodily harm unless the person reasonably believes every other

reasonable means to escape from or otherwise avoid death or great bodily harm has been exhausted.

However, even if Shenelle McGrew had provoked an alleged attack of her, the defendant would still be allowed to act in defense of Shenelle McGrew if the defendant actually and reasonably believed that Shenelle McGrew was entitled to act in her own defense.

You should also consider whether the defendant provoked an alleged attack of him. A person who engages in unlawful conduct of a type likely to provoke others to attack, and who does provoke an attack, is not allowed to use or threaten force in self-defense or defense of others against that attack.
(109: 9-13).

The jury returned a verdict of guilty on both counts (107)

B. Post conviction proceedings

A review of CCAP set forth in the post conviction motion (188: 11; App. 127) indicated that AB had the following prior convictions in Brown County Wisconsin for which he was not impeached by either side at trial:

Date of Conviction	Offense	Case Number
3-31-2016	Possession of THC	16 CM 106
3-31-2016	Carry Concealed Weapon	16 CM 106
5-19-2017	Possession of THC	16 CM 303

In addition, the State indicated in a document it had provided to Attorney Hassel before trial (202) that AB had convictions in Marquette, Michigan for Operating with a Suspended License (2005); Telephone Tapping/Cutting Lines (2003) and Domestic Violence (2003) (203). As noted above, the parties stipulated to five convictions as to AB for purposes of impeachment (168: 9) .

At the post conviction motion hearing, Attorney David Hassel testified that he received an email from Assistant District Attorney Saunders dated January 28, 2022 and an attachment (209: 6-8). There was an agreement with the State as to the convictions that could be offered into evidence (209: 8). Hassel was unsure if he made a conscious decision but might have chosen not to impeach AB with his prior convictions because the jury knew AB had lost a leg and was a member of a gang. Impeachment might cause the jury to sympathize with AB (209: 9-10). The video at the trial was grainy but covered most of the incident (209: 13).

In her decision denying Cross's post conviction motion, Judge Tammy Jo Hock found that the jury instruction on defense of others as to Count One was proper (208: 7- 9 : App. 109-111). The instruction did not prevent the jury from concluding that Cross was privileged to defend McGrew if the jury believed that AB attacked McGrew (208: 9; App. 111). The jury could have found that AB escalated the situation when he pointed the gun at Cross (208: 9; App. 111). However, the security camera verified that Cross backed up after AB pointed the gun at Cross (208: 9; App. 111). The jury could have believed Cross' testimony

that AB hit McGrew with gun or that AB backed up to shoot McGrew (208: 10; App. 112). Under the instructions, Cross could not claim defense of others privilege if Cross provoked the attack (208: 10; App. 112).

On the claim of ineffective assistance of counsel, Judge Hock concluded that even if Hassel was deficient by not impeaching AB, Cross was not prejudiced (208: 12; App. 114). AB was thoroughly cross-examined at trial and there was substantial video evidence (208: 13; App. 115).

Further facts will be stated in the argument below.

STANDARD OF REVIEW

A trial court's decision to admit evidence and determine jury instructions is a discretionary one, and appellate courts will not reverse the trial court's decision unless the record shows that the ruling was manifestly wrong and an [erroneous exercise] of discretion. *State v. Moats*, 156 Wis. 2d 74, 96, 457 N.W.2d 299, 309 (1990). Also see *State v. Vicks*, 104 Wis.2d 678, 690, 312 N.W.2d 489, 495 (1981).

As to ineffective assistance of counsel, whether a defendant received ineffective assistance of counsel presents a mixed question of law and fact. *State v. Thiel*, 2003 WI 111, ¶ 21, 264 Wis.2d 571, 665 N.W.2d 305. This court will uphold the circuit court's findings of fact, “includ[ing] ‘the circumstances of

the case and the counsel's conduct and strategy,' ” unless they are clearly erroneous. *Id.* (quoting *State v. Knight*, 168 Wis.2d 509, 514 n. 2, 484 N.W.2d 540 (1992)). Whether counsel's performance constitutes constitutionally ineffective assistance of counsel, which requires a showing by the defendant that counsel performed deficiently and that the error or errors prejudiced the defendant, presents a question of law that this court decides de novo. *Id.*; *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed. 674 (1984), (setting forth the two components of an ineffective assistance of counsel claim: “First, the defendant must show that counsel's performance was deficient.... Second, the defendant must show that the deficient performance prejudiced the defense.”). *State v. Domke*, 2011 WI 95, 337 Wis.2d 268, 805 N.W.2d 364.

ARGUMENT

I. THE COURT INCORRECTLY INSTRUCTED THE JURY ON COUNT ONE THAT CROSS WAS NOT ENTITLED TO ACT IN DEFENSE OF MCGREW IF CROSS PROVOKED AB’S ATTACK ON MCGREW.

The parties and court engaged in extensive discussion of whether the jury could find that Cross forfeited the right to act in defense of others (McGrew) if he provoked the attack by the conduct for which he was convicted in Count Two (the first strike). The court ultimately decided that if the jury so found, Cross could not use potentially deadly force in defense of McGrew. (169: 308). As will be

argued below, the court's statement in its decision denying the post conviction motion that the jury could so find was incorrect. See the jury instruction set forth above on pages 16-19.

Sec. 939.48, Wis. Stats. states as follows:

939.48 Self-defense and defense of others.

(1) 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.

(1m) (a) In this subsection:

1. "Dwelling" has the meaning given in s. [895.07 \(1\) \(h\)](#).
2. "Place of business" means a business that the actor owns or operates.
(ar) If an actor intentionally used force that was intended or likely to cause death or great bodily harm, the court may not consider whether the actor had an opportunity to flee or retreat before he or she used force and shall presume that the actor reasonably believed that the force was necessary to prevent imminent death or great bodily harm to himself or herself 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, or place of business, the actor was present in the dwelling, motor vehicle, or place of business, 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, or place of business after unlawfully and forcibly entering it, the actor was present in the dwelling, motor vehicle, or place of business, and the actor knew or reasonably believed that the person had unlawfully and forcibly entered the dwelling, motor vehicle, or place of business.

(b) The presumption described in par. (ar) does not apply if any of the following applies:

1. The actor was engaged in a criminal activity or was using his or her dwelling, motor vehicle, or place of business to further a criminal activity at the time.

2. The person against whom the force was used was a public safety worker, as defined in s. 941.375 (1) (b), who entered or attempted to enter the actor's dwelling, motor vehicle, or place of business in the performance of his or her official duties. This subdivision applies only if at least one of the following applies:

a. The public safety worker identified himself or herself to the actor before the force described in par. (ar) was used by the actor.

b. The actor knew or reasonably should have known that the person entering or attempting to enter his or her dwelling, motor vehicle, or place of business was a public safety worker.

(2) Provocation affects the privilege of self-defense as follows:

(a) A person who engages in unlawful conduct of a type likely to provoke others to attack him or her and thereby does provoke an attack is not entitled to claim the privilege of self-defense against such attack, except when the attack which ensues is of a type causing the person engaging in the unlawful conduct to reasonably believe that he or she is in imminent danger of death or great bodily harm. In such a case, the person engaging in the unlawful conduct is privileged to act in self-defense, but the person is not privileged to resort to the use of force intended or likely to cause death to the person's assailant unless the person reasonably believes he or she has exhausted every other reasonable means to escape from or otherwise avoid death or great bodily harm at the hands of his or her assailant.

(b) The privilege lost by provocation may be regained if the actor in good faith withdraws from the fight and gives adequate notice thereof to his or her assailant.

(c) A person who provokes an attack, whether by lawful or unlawful conduct, with intent to use such an attack as an excuse to cause death or great bodily harm to his or her assailant is not entitled to claim the privilege of self-defense.

(3) The privilege of self-defense extends not only to the intentional infliction of harm upon a real or apparent wrongdoer, but also to the unintended infliction of harm upon a 3rd person, except that if the unintended infliction of harm amounts to the crime of first-degree or 2nd-degree reckless homicide, homicide by negligent handling of dangerous weapon, explosives or fire, first-degree or 2nd-

degree reckless injury or injury by negligent handling of dangerous weapon, explosives or fire, the actor is liable for whichever one of those crimes is committed.

(4) A person is privileged to defend a 3rd person from real or apparent unlawful interference by another under the same conditions and by the same means as those under and by which the person is privileged to defend himself or herself from real or apparent unlawful interference, provided that the person reasonably believes that the facts are such that the 3rd person would be privileged to act in self-defense and that the person's intervention is necessary for the protection of the 3rd person.

(5) A person is privileged to use force against another if the person reasonably believes that to use such force is necessary to prevent such person from committing suicide, but this privilege does not extend to the intentional use of force intended or likely to cause death.

(6) In this section “unlawful” means either tortious or expressly prohibited by criminal law or both.

A trial judge has wide discretion in issuing jury instructions based on the facts and circumstances of the case. *State v. Vicks*, 104 Wis.2d 678, 690, 312 N.W.2d 489, 495 (1981). Jury instruction “is a crucial component of the fact-finding process.” *State v. Schulz*, 102 Wis.2d 423, 426, 307 N.W.2d 151 (1981). The trial court has broad discretion when instructing the jury, but must exercise its discretion in order to fully and fairly inform the jury of the applicable law. See *State v. Ziebart*, 2003 WI App 258, ¶ 16, 268 Wis.2d 468, 673 N.W.2d 369.

Cross’s defense to Count One was that he used his car to stop AB from harming McGrew by shooting or using AB’s gun as a bludgeon against her. A jury might find that Cross provoked AB into getting his gun and striking or threatening McGrew with it in response to provocation by Cross through his conduct in Count Two (the first hit). The issue in this case is whether Cross was

entitled to defend McGrew (though not himself) from a reaction to Cross's own provocation. The court held while drafting the instruction that he was not.

Part of the very extended discussion during the jury instruction conference was the following:

THE COURT: They want to add one phrase at the end under Provocation, fourth paragraph, "provided the defendant did not provoke the attack." What are your thoughts on that? Am I accurately stating what you want to do with that instruction, Mr. Saunders?

MR. SAUNDERS: Yes.

THE COURT: What's your position with respect to that, Mr. Hassel?

MR. HASSEL: I would have to oppose it. To the point it might clarify something, I don't agree it's necessarily the law. To the point the intent is to clarify that point, I think it causes more risk of the jury misreading and misimplying the entire instruction. I don't see substantively really what it adds.

THE COURT: What I think it adds, and then you can tell me what you think, I think it's saying that if she provoked the attack, he would be able to still defend her if she was still given the opportunity to act in self-defense, but not if he provoked it, which I think is an accurate statement of the law. If that's not, tell me where or why. Because earlier it says if he provoked it, he's not allowed to use or threaten force in self-defense,

(169: 308).

The instruction given on Count One concluded with the following which precluded Cross from acting in defense of McGrew if Cross provoked the attack on McGrew with the first hit:

You should also consider whether the defendant provoked an alleged attack of him. A person who engages in unlawful conduct of a type likely to provoke others to attack, and who does provoke an attack, is not allowed to use or threaten force in self-defense or defense of others against that attack.

(109: 13)

The instruction by its terms as applied to the facts of this case did not allow Cross to act in defense of McGrew if Cross provoked the attack by the first hit contrary to the opinion expressed by the court in its decision on the post conviction motion. Defense of others under Sec. 939.48(4) may be exercised in circumstances such as these even if the actor provoked the attack on the third person. At best, the instruction is confusing as to whether Cross could defend McGrew from an attack by AB provoked by the first hit.

There are no Wisconsin or other relevant cases the undersigned attorney has been able to find on this precise issue. But the plain language of Sec. 939.48(4), Wis. Stats. may be sufficient to decide the issue. Under that section, the focus is on the right of the defended person to defend him/her self. If McGrew was privileged to defend herself from further aggression by AB, Cross was permitted to defend McGrew even if Cross's own actions prompted AB to point a gun at her or strike her with a gun. To the extent that McGrew provoked the incident inside of American Foods or even in the parking lot, that provocation was over after Cross engaged in the conduct included in Count Two.

The purpose of the defense of others statute is to provide the greatest possible protection of innocent human life. It would make no sense to state that a person who provokes an incident which endangers someone else's life cannot take action to prevent the third person from losing her life from his misconduct. This was exactly what happened in the parking lot of American Foods on the evening of May 27, 2021 if the jury was to accept the testimony of Cross and McGrew. But the jury was informed that Cross had no right to defend McGrew because of Cross's provocation even if they believed the testimony that AB pointed a gun at her and struck her with it (169: 125-126, 167-168). .

In its ruling on the post conviction motion, Judge Hock stated that the instruction given only prohibited Cross from claiming defense of others for an attack Cross provoked of himself (208: 10; App.. 112). However, the instruction given stated that if Cross provoked an alleged attack of Cross that he was "not allowed to use or threaten force in self-defense *or defense of others against that attack* (emphasis added) (109: 13; see also 208: 9; App. 111). The issue in the case was whether Cross had a privilege to defend McGrew after he provoked AB by striking AB in the leg with Cross's car the first time. McGrew claimed that after the first hit, AB hit her with a gun and pointed it at McGrew (169: 125-126, 167-168). Cross's testimony regarding that portion of the incident was similar (169: 187, 213-314, 231). There was a viable argument that Cross, by engaging in the first hit, caused AB to then attack McGrew. Under the instruction given by

the court, Cross could not claim defense of others to then use force against AB because Cross's first hit had provoked AB's actions against McGrew, AB's friend.

The jury instruction given did not set forth how the jury was to analyze the privilege of defense of others if determined that Cross withdrew from the fight after the first strike when Cross put his car in reverse and backed away. This would have reinstated Cross's right to defend others under Sec. 939.48(2)(b), Wis. Stats. That also was a defect in the jury instruction that Cross's counsel objected to during the jury conference.

This was a complicated scenario of events. But the instruction on provocation given effectively prevented the jury from finding defense of others as a defense to Count One because under reasonable interpretations of the evidence it foreclosed Cross from having that defense due to provocation by the first hit. . Wis. *JI-Criminal* 835 had an optional paragraph the court did not use that read, "A person who provokes an attack may regain the right to use or threaten force if the person in good faith withdraws from the fight and gives adequate notice of the withdrawal to his assailant." Arguably, when Cross backed up after hitting AB the first time, he withdrew from the fight and gave notice he did not intend to continue. But when AB attacked McGrew, it showed that AB wished to continue the fight after Cross's withdrawal. It could be argued that Cross's right to defend McGrew was reinstated by those circumstances. But the jury instruction given, which did not include that paragraph, ended the jury's analysis with evidence of

provocation by Cross and no circumstances explained to the jury that might have reinstated it in this case.

Only if the jury instructions, as a whole, misled the jury or communicated an incorrect statement of law will appellate courts reverse and order a new trial.. *State v. Laxton*, 2002 WI 82, ¶ 29, 254 Wis. 2d 185, 647 N.W.2d 784. A new trial should be ordered only if there is a reasonable likelihood that the jury was misled and therefore applied potentially confusing instructions in an unconstitutional manner. *State v. Lohmeier*, 205 Wis. 2d 183, 193-194, 556 N.W.2d 90 (1996).

Provocation was the key issue as to Count One. The incorrect instruction affected the verdict looking at the trial as a whole. Because the instruction misstated or inadequately stated the law, a new trial on Count One is necessary.

II.. CROSS WAS DEPRIVED OF EFFECTIVE ASSISTANCE OF COUNSEL BY THE FAILURE OF ATTORNEY HASSEL TO IMPEACH AB WITH AB'S FIVE PRIOR CONVICTIONS..

Sec. 906.09, Wis. Stats. permits asking a witness how many times the witness has been convicted or adjudicated delinquent "[f]or the purpose of attacking character for truthfulness[.]" Sec. 906.09(1). A court considers any relevant factors in deciding whether a particular conviction or adjudication should be excluded because "its probative value is substantially outweighed by the danger of unfair prejudice." Sec. 906.09(2). Our supreme court has interpreted the statute as "inten[ding] that all criminal convictions be generally admissible for

impeachment purposes." *State v. Kuntz*, 160 Wis. 2d 722, 751-52, 467 N.W.2d 531 (1991).

This reflects the law's recognition that a person "who has been convicted of a crime is less likely to be a truthful witness than one who has not been convicted." *Nicholas v. State*, 49 Wis.2d 683, 688, 183 N.W.2d 11, 14 (1971). Wisconsin law presumes that criminals as a class are less truthful than persons who have not been convicted of a crime. *State v. Gary M.B.*, 2004 WI 33, ¶ 21, 270 Wis.2d 62, 676 N.W.2d 475. Under Rule 906.09(2), "[e]vidence of a conviction of a crime ... may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice."

"Whether to admit prior conviction evidence for impeachment purposes under Rule 906.09 is a matter within the discretion of the trial court [,]" *State v. Smith*, 203 Wis.2d 288, 295, 553 N.W.2d 824, 827 (Wis. App.1996), and the Court of Appeals will uphold discretionary decisions when the trial court applied the correct law to the pertinent facts and reached a reasonable determination, *State v. Gary M.B.*, 2004 WI 33, ¶ 19, 270 Wis.2d 62, 76, 676 N.W.2d 475, 483..

Under well-established Wisconsin law, a witness could be asked whether he had been convicted of a crime and how many times, but, if these questions were answered truthfully and accurately, no further questions could be asked. *Scott v. State*, 64 Wis.2d 54, 60, 218 N.W.2d 350 (1974).

In this case, there was an agreement by counsel that AB could be impeached with five convictions which the court accepted prior to jury selection without analysis of the rationale (168: 9). For purposes of this brief, Cross will assume that five convictions was a proper number for impeachment of AB.

To sustain a claim of ineffective assistance of counsel, Cross must show that trial counsel's representation was deficient and that her defense was prejudiced by the deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed. 674 (1984). A defendant must show both deficient performance and prejudice; therefore, "reviewing courts need not consider one prong if the defendant has failed to establish the other." *State v. Chu*, 2002 WI App 98, ¶47, 253 Wis. 2d 666, 643 N.W.2d 878. Counsel's assistance is constitutionally deficient if it falls below an objective standard of reasonableness and it is constitutionally prejudicial if the defendant demonstrates "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *State v. Thiel*, 2003 WI 111, ¶¶19-20, 264 Wis. 2d 571, 665 N.W.2d 305 (citation omitted).

Counsel's performance is deficient if counsel's performance fell below an objective standard of reasonableness, and the deficient performance prejudiced the defense if, absent the errors, there is a reasonable probability of a different result. See *Strickland v. Washington*, 466 U.S. 668, 687-94 (1984).

Judge Hock assumed there was deficient performance by Attorney Hassel in not impeaching AB with his five prior convictions (208: 12; App. 114) and only analyzed the second prong of *Strickland*.

The second prong of *Strickland* is whether the deficient performance undermined confidence in the verdict. This is similar to the analysis the court engages in to determine whether an objected to error is sufficiently prejudicial to warrant a new trial. For the reasons stated in (II) above, evidence of the prior convictions of the two most important State witnesses was necessary to fully evaluate the evidence in the case. Exhibit 2 (the video) was important but not dispositive. There was conflicting testimony as to what happened after the first hit. Whether or not AB struck McGrew or pointed a gun at her was subject to dispute. Although there was video evidence of the incident in the parking lot, the quality of the video was poor due to darkness and light rain during the late evening of May 27, 2021. The credibility of AB and Walker compared to Cross and McGrew was important. While the State impeached Cross with eight convictions and McGrew with five, the jury never heard that AB had five convictions. This was significant enough to warrant granting a new trial on both counts since the credibility of the witnesses, including AB, was important to the jury's determination. A new trial is required.

CONCLUSION

For the reasons stated above, Cross requests that this court reverse the judgment of conviction and decision and order denying the post conviction motion. In the alternative, he asks that the conviction and sentence for Count One be vacated and a new trial ordered for that offense .

Dated this 15th day of January 2024

Electronically signed by Len Kachinsky

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CERTIFICATION AS TO BRIEF LENGTH

I hereby certify that this brief conforms to the rules contained in Sec. 809.19(8)(b) and (c) for a brief and appendix produced with proportional serif spaced font. This brief has 8380 words, including table of contents, certifications and cover page..

Dated this 15th day of January 2024

Electronically signed by Len Kachinsky

LEN KACHINSKY

CERTIFICATION OF ELECTRONIC FILING

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

Dated this 15th day of January 2024

Electronically signed by Len Kachinsky

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