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BY THE COURT:

DATE SIGNED: June 22, 2022

Electronically signed by Honorable David Borowski

Circuit Court Judge

STATE OF WISCONSIN CIRCUIT COURT

Branch 12

MILWAUKEE COUNTY

STATE OF WISCONSIN

Plaintiff,

Vs.

CaseNo.20cf001459

HENRY L. WATSON,

Defendant.

DECISION AND ORDER DENYING MOTION TO

VACATE

CONVICTION

On December 27, 2021, the defendant by his attorney filed a postconviction motion to vacate his conviction for homicide by negligent handling of a dangerous weapon and to dismiss the case. The facts stemmed from an altercation between the defendant and TLB. During the

incident, which was captured on video, TLB approached the defendant during an argument.

TLB can be seen on the video putting his hands up, turning, and running away from the defendant while the defendant shot him. As a result of the shooting, Javon Lattimore, who was underneath a vehicle fixing a car, was shot and killed. The defendant claimed that he was acting

in self-defense. On January 7, 2021, the jury found the defendant guilty of the lesser included offense of homicide by negligent handling of a dangerous weapon as to Javon Lattimore and acquitted the defendant of count two, first degree reckless injury, use of a dangerous weapon, as to TLB. On March 25, 2021, the court sentenced the defendant to five years of initial

confinement followed by five years of extended supervision. The defendant now alleges that counsel was ineffective for failing to move for a directed verdict and alleges that that the self-defense statute, section 939.48(3), Stats., is unconstitutional. The court ordered a briefing schedule in this matter, to which the parties have responded.

Strickland v. Washington, 466 U.S. 668, 694 (1984), sets forth a two-part test for determining whether an attorney's actions constitute ineffective assistance: deficient performance and prejudice to the defendant. Under the second prong, the defendant is required to show "that there is a reasonable probability, but for counsel's unprofessional errors, the result of the proceeding would have been

different." Id. at 694; also *State v. Johnson*, 153 Wis.2d 121, 128 (1990). A court need not consider whether counsel's performance was deficient if the matter can be resolved on the ground of lack of prejudice. *State v. Moats*, 156 Wis.2d 74, 101 (1990). In order to obtain an evidentiary hearing, the defendant must allege within the four corners of the

document itself sufficient material facts for reviewing courts to meaningfully assess a defendant's claim; that is, who, what, where, when, why, and how (the five "w's" and one "h"). *State v. Balliette*, 336 Wis.2d 358, ¶ 59 (2011) (citing *State v. Allen*, 274 Wis.2d 568 (2004)). Ineffectiveness claims require a postconviction evidentiary hearing in order to preserve trial counsel's testimony. *State v. Machner*, 92 Wis. 2d 797, 804 (Ct. App. 1979). However, an evidentiary hearing is not a "fishing expedition," and the circuit court and the State "are entitled to know what is expected to happen at the hearing, and what the defendant intends to prove."

State v. Balliette, 336 Wis. 2d 358, ¶ 68 (2011). A defendant may not rely on conclusory allegations in his or her postconviction motion, hoping to supplement them at an evidentiary hearing. See *State v. Bentley*, 201 Wis. 2d 303, 313-18 (1996). If the defendant fails to allege sufficient facts in his motion to raise a question of fact, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the trial court may in the exercise of its legal discretion deny the motion without a hearing. *Nelson v. State*, 54 Wis.2d 489, 497-498 (1972). Assertions that his attorney 'failed to keep him fully apprised of the events,' 'failed to completely review all of the necessary discovery

material ' and 'failed to completely and fully investigate any and all matters' are simply not the type of allegations that raise a question of fact. State v. Washington, 176 Wis.2d 205, 215-216 (Ct. App. 1993). The defendant's claim that trial counsel was ineffective for failing to move for a directed verdict as to count one is without merit because the record plainly shows that counsel requested a directed verdict, and the court denied the request:

MR. HUEBNER: Entry of the verdicts, please.

MR. PLAISTED: I would ask for a judgment of acquittal on Count 2 and judgment notwithstanding the verdict on Count 1.

THE COURT: I'll enter a judgment on both of the verdicts as rendered by the jury; on Count 1, guilty of homicide by negligent handling of a firearm, which is a lesser included, so I'll enter a judgment of conviction on that charge on Count 1 of the information, and I'll enter a judgment of acquittal on Count 2. (Tr . 1/7/2021, p. 12). Counsel cannot be deemed deficient for failing to make a motion that he actually made. The defendant ' s arguments on this point are based entirely on his assumption that the jury acquitted him on count two because they affirmatively accepted his claim of self-defense, which he believes is in conflict with the finding of guilt on count one. The jury's acquittal is not an affirmative finding in favor of self-defense; it is merely the result of the jury finding that the State failed to prove one or more elements beyond a reasonable doubt. As the court noted at sentencing, in the court's standard debriefing with the jury, after the verdict was rendered, the court was informed that the jury was troubled by the fact that the State could not

produce TLB at the trial. (3/25/2021, p. 39). Regardless, as the State points out in its response, pursuant to section 939.48(3), Stats., self-defense does not apply to the unintended infliction of harm to Javon Lattimore:

(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.

As Wisconsin law clearly precludes the use of a self-defense claim as to a third party, the court stands by its prior denial of the defendant's motion for a directed verdict. As to the defendant's claim that trial counsel should have put forth a novel constitutional argument in support of his motion for a directed verdict, an attorney is not ineffective by failing to pursue a novel legal theory. See *State v. McMahon*, 186 Wis. 2d 68, 84 (Ct. App. 1994). The defendant also suggests for the first time in his reply brief that trial counsel was ineffective for requesting a lesser included offense of homicide by negligent handling of a dangerous weapon. The court generally does not consider claims raised for the first time in a reply brief because it deprives the State an opportunity to respond. Nevertheless, the defendant's assertion here is conclusory, undeveloped, and amounts to little more than "Monday morning quarterbacking."

" See *State v. Byrge*, 225 Wis.2d 702 (1999). The fails to allege sufficient facts to entitle him to relief, and therefore, his motion for a new trial based on ineffective assistance of counsel is denied. The defendant next claims that section 939.48(3), Stats., is unconstitutional because it puts an impossible burden on anyone who is acting in self-defense. The court agrees with the State's argument that the defendant's claim is deficiently plead, and adopts it:

In the instant case, the Defendant has failed to meet his burden in several ways. First, the Defendant never clearly alleges how the statute is unconstitutional or what constitutional provision it violates, "[h]e merely asserts that this is the case."

State v. Scherreiks, 153 Wis.2d 510, 520 (Ct. App. 1989). "Simply to label a claimed error as unconstitutional does not make it so." *State v. Lobermeier*, 343 Wis.2d 456, 474, n. 6 (Ct. App. 2012). This Court "need not decided the validity of constructional claims broadly stated but never specifically argued." *Id.* In the instant case, the Defendant claims that 939.48(3) is unconstitutional because it requires those acting in self-defense to know where third parties are during the incident. He does not state which constitutional provisions this violates, or how this statute stands in contrast to a constitutional prohibition. Rather, he simply makes a conclusory claim and thus should be denied pursuant to *State v. Allen*, 274 Wis.2d 568 (2004).

Additionally, the cases cited by the Defendant do not support his own contentions as neither case was decided on constitutional grounds. Additionally, neither case involves statutory interpretation, but rather just an analysis of local self-defense law. (State's response at pp. 9-11).

Again, the defendant seeks to remedy the deficiencies in his motion by raising new claims in his reply brief. The defendant asserts in his reply brief that section 939.48(3), Stats., is unconstitutionally vague. The "void for vagueness" doctrine is grounded in procedural due process. See *State v. Driscoll*, 53 Wis. 2d 699, 701-02 (1972). "[A] statute is void for vagueness if it does not provide 'fair notice' of the prohibited conduct and also provide an objective standard for enforcement of violations." *State v. Smith*, 215 Wis. 2d 84, 91 (Ct. App. 1997). "Stated another way, '[t]he first prong of the vagueness test is concerned with whether the statute sufficiently warns persons wishing to obey the law that [their] ... conduct comes near the proscribed area.'" *Id.* (alteration in *Smith*; citations and one set of quotation marks omitted).

However, a statute "need not define with absolute clarity and precision what is and what is not unlawful conduct." *State v. Nelson*, 2006 WI App 124, iJ36, 294 Wis. 2d 578 (citations omitted). A statute is not void for vagueness merely because its applicability may be uncertain in some situations. *Id.* Again, the defendant's argument on this point is undeveloped and insufficient to warrant relief. Even putting the defective pleadings aside, the court rejects the defendant's vagueness argument on the merits. The privilege of self-defense does not apply to the infliction of harm on a third person if that conduct amounts to homicide by negligent handling of dangerous weapon. That interpretation is plain as day, unambiguous, and comes right from the statute. That the defendant may not agree with the result does not render the statute unconstitutionally vague. The defendant's final

argument that section 939.48(3), Stats., is an unconstitutional ex post facto law is patently frivolous and denotes a fundamental misapprehension of ex post facto law. An ex post facto violation occurs if a law "inflicts a greater punishment than the law annexed to the crime at the time it was committed." State v. Thiel, 188 Wis.2d 695, 701 (1994). It is undisputed that section 939.48(3), Stats., as well as the other applicable laws and penalties were all in effect and being applied prospectively to the defendant's conduct when he committed the offense on April 6, 2020.¹

Therefore, there is no ex post facto problem. In sum, the defendant has failed to provide a cogent constitutional argument in support of his belief that his statutory privilege of self-defense permits him to use a firearm in a public area in a manner that results in the death of an innocent bystander. The defendant fired a gun at a fleeing, unarmed man in a public space, and struck an innocent man. Whatever the jury's rationale was in finding the State had failed to meet its burden as to TLB, the killing of Mr. Lattimore was not privileged by the constitution or by statute. The defendant's motion is denied. Finally, the defendant filed a separate motion asking the court to recuse itself based on the court's conversation with the jury. Again, the defendant's request is devoid of any cogent legal analysis. Court debriefing with jurors is commonplace, and it provides the court an opportunity to thank the jury for their service as well as for the jurors to provide feedback and ask questions of the court. To be clear, this is done solely after the jury's verdict is rendered so it has no impact on the outcome of the proceedings. The defendant has not cited to any

authority which precludes or disapproves of this practice, and therefore, the defendant's motion for recusal on these grounds is rejected as frivolous.

THEREFORE, IT IS HEREBY ORDERED that the defendant's motion for postconviction relief is DENIED.

COURT OF APPEALS DECISION

DATED AND FILED

October 3, 2023

Samuel A. Christensen

Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No.

2022AP1449-CR

Cir. Ct. No. 2020CF1459

STATE OF WISCONSIN

IN COURT OF APPEALS

DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

HENRY L. WATSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County:

DAVID L. BOROWSKI, Judge. Affirmed.

Before White, C.J., Donald, P.J., and Dugan, J.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

No. 2022AP1449-CR

¶1 PER CURIAM. Henry L. Watson appeals from a judgment of conviction for homicide by negligent handling of a dangerous weapon following a jury trial and an order denying his motion for postconviction relief. In his brief, Watson asserts, in his statement of issues, that “[t]he [c]ircuit [c]ourt did not properly instruct the jury on perfect self-defense[.]” He also states that trial counsel was ineffective because he “failed to challenge the constitutionality of the statute. His trial counsel failed to properly object to the [j]ury’s verdict.” We reject Watson’s arguments, and thus, we affirm the judgment of conviction and the order denying the postconviction motion.

BACKGROUND

¶2 On April 6, 2020, Milwaukee police officers responded to a report of a shooting in the parking lot of an auto parts store in the City of Milwaukee. They found Thomas Jones¹, who told them that he had been shot in his lower abdomen and right flank. The officer did not find a weapon on Jones and he was transported to a hospital. Officers found a second victim, Javon Lattimore, lying next to a red Chevy Impala that was lifted up on a jack—he had been shot four times and died.

¶3 A witness identified Watson in a photo array and told police that she saw him talking to Lattimore and Jones, pulling out a handgun, and firing it seven or eight times in the direction of the red Chevy Impala, shooting Lattimore and Jones. Jones told police that he met Watson the day before the shooting, while working on cars at the store. On the day of the shooting, he got into an argument with Watson and as he was walking toward Watson, Watson pulled out a gun, Jones put his hands up in the air, and Watson fired shots at both Lattimore and Jones, which hit both of them. Watson told police that he got into an argument with Jones and as Jones approached him, Jones reached into his pocket. Watson said that he believed that Jones was armed, so he pulled out his gun and shot at Jones. Security cameras captured the incident.

¶4 The State charged Watson with one count of first-degree reckless homicide, use of a dangerous weapon as to Lattimore, and first-degree reckless injury, use of a dangerous weapon as to Jones. The matter proceeded to a four-day jury trial that

started on January 4, 2021. The State was unable to secure Jones' appearance to testify as a witness. Officers testified regarding what they saw at the scene of the shooting and their investigation. They found ten fired 9mm cartridge casings, multiple bullets, and bullet damage to the area around the store. Police concluded that the shooter took the gun with him and they found no evidence to suggest that Jones or Lattimore had a gun that day.

¶5 About four hours after the shooting, a detective received a phone call from Watson. Watson told the detective that he made a mistake and wanted to turn himself in with the gun he used to shoot at Jones. When officers went to meet Watson, he gave them his firearm and ammunition, was cooperative, gave a DNA sample, and made a full statement to police. As a result of their investigation, the officers concluded that the 9mm casings, bullets, and bullet jackets found at the scene were all fired from Watson's firearm.

¶6 The jury saw surveillance video from the store which captured the incident and the shooting. The video showed that as Jones approached a man in dark clothing, Jones first put his left hand up and then down, he almost immediately put both hands up, and then turned and ran away from the man in the dark clothing. As he ran, the man in the dark clothing raised his right arm and pointed it at Jones, which was consistent with shooting at Jones as he ran away toward the red Chevy Impala. The video from the gas station nearby showed Jones running from the store and trying to flag down people to get help.

¶7 An eyewitness to the shooting testified that she had gone to the store on the day of the shooting in the red Chevy Impala, which was her boyfriend's car, to get it fixed. The car was jacked up in the parking lot and she and her boyfriend sat inside the store. She did not see the two men near the red Chevy Impala with any firearm or weapon and she heard the man under the car tell the other man to go tell Watson to move along. She testified that when the man went over to Watson, Watson pulled out a gun, shot in the air once or twice, and then shot the man. She saw Watson shoot at least seven times. She identified Watson as the shooter in a photo array and also at trial.

¶8 Watson testified that he was at the store parking lot on the day of the shooting trying to get work by handing out his business cards and talking to people. He saw Jones and Lattimore talking, while Lattimore was working on the red Chevy Impala—he saw Lattimore come from under the car and grab some tools. Then Jones approached Watson—upset, with his left hand raised, and his right hand in his pocket. Watson testified that as Jones walked toward him, Jones was “yelling” at Watson telling him to “move the fuck around.” Jones “had his left hand in his pocket,” then “was lifting it up” and showed Watson “something black,” which Watson “thought was a gun” because Jones said, “I’m going to fuck your ass up.” Watson then pulled his own gun out of his pants pocket because he thought that he was in danger and fired his weapon. He testified that Jones “turned” and “deviated to the left as if he was about to try to turn around and return fire,” so he “continued to fire” until Jones was behind the red Chevy Impala. Watson stated that he ran

back to his own car so he would not get shot. Watson further testified that later that day someone told him that two people had been shot in the store parking lot. He called the police, told him that he was involved, was cooperative, and was shocked when police told him that someone under the car had died in the shooting.

¶9 At the close of the evidence, the parties agreed that for count one—first-degree reckless homicide, use of a dangerous weapon, of Lattimore—the jury should be instructed on the lesser-included offense of second-degree reckless homicide, use of a dangerous weapon. The next morning trial counsel also requested an instruction for the lesser-included offense of homicide by negligent handling of a dangerous weapon—the circuit court granted the request. As a part of the instructions regarding count one, the circuit court specifically instructed the jury on self-defense:

There is evidence in this case that [Watson] was acting in self-defense as to [Jones]. The fact that the law may allow [Watson] to use force in self-defense as to [Jones], does not necessarily mean that the causing of harm to [Lattimore] was lawful. You must consider the law of self-defense in deciding whether [Watson's] conduct as to [Jones] was criminally reckless conduct, ... but [Watson] does not have a privilege of self-defense as to [Lattimore]².

¶10 The jury rendered verdicts of guilty of the lesser-included offense of homicide by negligent handling of a firearm on count one related to Lattimore, and not guilty on count two related to Jones. Trial counsel moved the court for “judgment of acquittal on Count two and judgment notwithstanding the verdict on Count one.” The circuit

court stated that it would “enter a judgment on both of the verdicts as rendered by the jury[.]”

¶11 At sentencing, the circuit court described the video evidence as showing that during a confrontation between Watson and Jones, while Jones had both arms up, Watson fired shots at him that killed an “innocent person, [Lattimore.]” After discussing the reasons for imposing the sentence, the court sentenced Watson to the maximum sentence on count one of ten years of imprisonment, consisting of five years of initial confinement and five years of extended supervision.³

¶12 Watson filed a postconviction motion seeking “an order vacating the judgment of conviction and to dismiss the case.” He alleged that trial counsel performed deficiently, first, because “[h]e did not object to the verdict of guilty” on the count of homicide by negligent handling of a dangerous weapon, as he should have. He argues that trial counsel was deficient for failing to object because “he was found not guilty by self-defense on the count of [first-degree] reckless injury use of a dangerous weapon”—count two—and because “he unintentionally kill[ed]” Lattimore, while “lawfully defending himself from [Jones].” Watson asserted that he had no intent to kill Lattimore, and therefore, he cannot be criminally liable because he cannot be criminally negligent “if he was found to be acting lawfully by self-defense.” Second, he alleged that trial counsel was deficient by failing “to question the constitutionality of the statutes.”

¶13 In a written decision and order, the circuit court denied Watson’s motion without a hearing.

DISCUSSION

I. Watson could not claim self-defense as to count one

¶14 At the outset, we note that Watson makes a convoluted argument that because he was lawfully intentionally acting in self-defense against Jones, that he cannot be found guilty of negligently killing Lattimore. He states that:

The principal question for the jury at the end of the trial [sic] was not whether Lat[t]imore had been killed or who had done it. Rather, the question came down to intent: what was Watson's intent when he pulled his gun out, and what was his intent when he discharged his gun? If Watson killed Lat[t]imore while acting lawfully in self-defense towards [Jones], then no crime was proven.

Central to Watson's defense was his testimony that demonstrated why he pulled out his gun and discharged his gun towards [Jones] and without any intent in [striking] Lat[t]imore.

Watson further argues that:

Watson acted lawfully in self-defense and cannot be found to be criminally negligent at the same time An element of homicide by negligent handling of a dangerous weapon is the actor is actin[g] in a criminally negligent manner and by the way of self-defense jury instructions, lawfully action in self-defense and criminally negligent actions are mutually exclusive of each other and cannot co-exist at the same time.

¶15 The problem with Watson's argument is that, at best, he is asserting that he was acting in self-defense when shooting at Jones because he believed that Jones had a firearm and was going to shoot him. He does not allege that Lattimore was in any way threatening him at any time. Rather, he states, "Watson's sole issue in this case is whether he unintentionally kills a third-party [Lattimore] while using a justifiable force in self-defense is [he] criminally liable for the injury to the third party." He further argues that if Watson killed Lattimore, while acting lawfully in self-defense towards Jones, then no crime was proven.

¶16 We conclude that even if Watson could claim he acted in self-defense, based on his assertion that he believed that Jones had a gun and was going to shoot him, he could not claim that he acted in self-defense as to Lattimore. WISCONSIN STAT. § 939.48(3) clearly limits the privilege of self-defense where a defendant's conduct results in injury to an unintended third person. The statute in relevant part provides that:

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 ... first-degree or 2nd-degree reckless homicide [or] homicide by negligent handling of a dangerous weapon ... the actor is liable for whichever one of those crimes is committed. *Id.* (emphasis added).⁴

¶17 As noted, here Watson was charged with one count of first-degree reckless homicide, use of a dangerous weapon for shooting and killing Lattimore. The jury

found him guilty of the lesser-included offense of homicide by negligent handling of a firearm as to Lattimore. Watson acknowledges that he fired the gun to protect himself from Jones—not Lattimore. Therefore, the plain language of WIS. STAT. § 939.48(3) bars Watson from asserting self-defense to avoid conviction for homicide by negligent handling of a firearm as to Lattimore—a “3rd person.”

¶18 We conclude that, considering the facts of this case, including the fact that he was convicted of homicide by negligent handling of a firearm, because Watson offers no Wisconsin⁵ legal authority demonstrating the viability of his self-defense claim that he advances, he fails to show that he was entitled to claim self-defense as to the negligent handling of a firearm charge in count one involving Lattimore. Thus, as we next discuss, each of his other claims, which are based on his claim that he is entitled to a privilege of self-defense as to his shooting Lattimore, are without merit.⁶

II. Watson’s claims that the circuit court did not adequately instruct the jury on perfect self-defense and that trial counsel was ineffective for not objecting to the instructions

¶19 On appeal, Watson rephrases his claims that he asserted in his postconviction motion,⁷ now stating that the circuit court “did not adequately instruct the jury on perfect self-defense,” “the court did not give the jury proper instructions about criminal negligence and acting lawfully cannot coexist,” and trial counsel was ineffective when “he did not object to jury instructions which failed to inform the jury properly.”

¶20 These allegations are based on Watson's argument that because he was lawfully intentionally acting in self-defense against Jones, that he cannot be found guilty of negligently killing Lattimore. We concluded above that pursuant to WIS. STAT. § 939.48(3), Watson could not claim that he acted in self-defense as to Lattimore. Thus, we conclude that the circuit court properly instructed the jury that Watson did not have a privilege of self-defense as to Lattimore.

¶21 A defendant must show two elements to establish that his or her counsel's assistance was constitutionally ineffective: (1) counsel's performance was deficient; and (2) the deficient performance resulted in prejudice to the defense. See *State v. Balliette*, 2011 WI 79, ¶21, 336 Wis. 2d 358, 805 N.W.2d 334. We review independently, as a matter of law, whether the facts demonstrate ineffective assistance of counsel. See *State v. Pico*, 2018 WI 66, ¶13, 382 Wis. 2d 273, 914 N.W.2d 95.

¶22 Because, as noted, the jury instructions were proper, trial counsel could not have been deficient. It is not deficient performance for trial counsel to not pursue futile arguments.⁸ See *State v. Cameron*, 2016 WI App 54, ¶27, 370 Wis. 2d 661, 885 N.W.2d 611 ("It is not deficient performance for counsel not to make a pointless objection."); *State v. Toliver*, 187 Wis. 2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994) (stating that counsel is not ineffective for failing to pursue futile arguments).

III. Watson has not shown that WIS. STAT. § 939.48(3) is unconstitutional

A. Watson did not adequately plead his claim

¶23 In his motion for postconviction relief, Watson alleged that trial counsel was ineffective in failing “to question the constitutionality of the statutes.” He also asserted that:

The statute of self-defense [WIS. STAT. § 939.48(3)] is unconstitutional because it puts an impossible burden on anybody that is acting in self-defense. It creates that burden by stating that self-defense is exempted if the unintended infliction of harm to a third-party amounts to the crime of homicide by negligent handling of a dangerous weapon. This puts an unconstitutional burden on anybody that is lawfully engaged in self-defense and then knowing where third parties are, even if they are concealed. What this statute accomplishes is it punishes a person acting in the law that they could not conceivably predict. It’s [predicated] upon the result and not the act.

¶24 The circuit court adopted the State’s argument that Watson’s claim was deficiently pled. It incorporated the State’s argument into its written decision:

In the instant case, [Watson] has failed to meet his burden in several ways. First, [Watson] never clearly alleges how the statute is unconstitutional or what constitutional provision it violates, “[h]e merely asserts that this is the case.” *State v. Scherreiks*, 153 Wis. 2d 510, 520[, 451 N.W.2d 759] (Ct. App. 1989). “Simply to label a claimed error as unconstitutional does not make it so.” *State v. Lobermeir*,

[2021 WI App 77, ¶17 n.6, 343 Wis. 2d 456, 821 N.W.2d 400]. This court “need not decide[] the validity of [constitutional] claims broadly stated but never specifically argued.” Id.

In the instant case, [Watson] claims that [WIS. STAT. §] 939.48(3) is unconstitutional because it requires those acting in self-defense to know where third parties are during the incident. He does not state which constitutional provisions this violates, or how this statute stands in contrast to a constitutional prohibition. Rather, he simply makes a conclusory claim and thus should be denied pursuant to *State v. Allen*, [2004 WI 106,] 274 Wis. 2d 568, [682 N.W.2d 433].

¶25 We agree with the State’s argument, adopted by the circuit court, and conclude that Watson did not adequately plead his claim that trial counsel was ineffective for not challenging the constitutionality of WIS. STAT. § 939.48(3)⁹. Although we need not address Watson’s belated allegations in his reply brief to the circuit court that the statute was vague and was an ex post facto law, we do so briefly to be complete.

**B. Watson did not adequately allege that WIS. STAT. § 939.48(3) was
unconstitutionally vague**

¶26 Watson alleges that WIS. STAT. § 939.48(3) is unconstitutionally vague because it does not provide “fair notice of what type of conduct is proscribed.” His argument appears to challenge the statute as being vague as applied to him, asserting that when he shot Jones, he believed that he “was acting in self-defense in

a lawful manner,” and therefore, he could not be acting “in a criminal[ly] negligent manner” when he shot and killed Lattimore.

¶27 The legal standards governing a vagueness challenge are well settled. This court presumes that the statute is constitutional and “we review it with an eye towards preserving its constitutionality.” *State v. Hibbard*, 2022 WI App 53, ¶23, 404 Wis. 2d 668, 982 N.W.2d 105. “We will not invalidate a statute on vagueness grounds ‘if any reasonable and practical construction can be given its language[.]’” *Id.* (citation omitted). “A statute is unconstitutionally vague if it fails to give fair notice to a person of ordinary intelligence regarding what it prohibits and if it fails to provide an objective standard for enforcement.” *Id.*, ¶24 (citation omitted). “A fair degree of definiteness is all that is required.” *Id.* The constitutionality of a statute is a question of law that we review independently. See *id.*, ¶22.

¶28 As we concluded above, WIS. STAT. § 939.48(3) is not vague. The statute clearly and unambiguously states that the privilege of self-defense is not applicable where “the unintended infliction of harm [to a third person] amounts to the crime of ... homicide by negligent handling of a dangerous weapon.” See *id.*

Where the unintended harm amounts to homicide by negligent handling of a dangerous weapon, as it does here, “the actor is liable for” that crime. Watson does not refute that WIS. STAT. § 939.48(3) makes the privilege of self-defense inapplicable to his criminally negligent homicide of Lattimore.

¶29 It is not deficient performance for trial counsel to not pursue futile arguments. See Cameron, 370 Wis. 2d 661, ¶27 (“It is not deficient performance for counsel not to make a pointless objection.”); Toliver, 187 Wis. 2d at 360 (stating that counsel is not ineffective for failing to pursue futile arguments). It is also not prejudicial for trial counsel to have not raised a legal challenge to the statute if he could not establish that the challenge would have succeeded. See State v. Jackson, 229 Wis. 2d 328, 344, 600 N.W.2d 39 (Ct. App. 1999) (discussing that counsel’s failure to present legal challenge is not prejudicial if defendant cannot establish challenge would have succeeded).

¶30 We conclude that because any challenge to the constitutionality of WIS. STAT. § 939.48(3) on the grounds that it is vague would have been futile, Watson has not shown that trial counsel was ineffective in failing to pursue that futile argument.

C. Watson did not adequately allege that WIS. STAT. § 939.48(3) was an ex post facto law

¶31 Watson makes a convoluted argument that WIS. STAT. § 939.48(3) is an ex post facto law because he was engaged in innocent conduct when he shot at Jones and that his conduct was privileged by self-defense. He argues that § 939.48(3) “retrospectively” “summarily converted” his innocent conduct of shooting at Jones in self-defense into “criminal conduct.” He further argues that:

At the time [Watson] pulled the trigger on his firearm, he was acting lawfully. At the time that the bullet travelled through the air, the intent of

[Watson] that travelled with it, was innocent. It was not until the bullet regrettably and tragically struck [Lattimore] that [Watson's] conduct became a crime. Watson did not possess the requisite mens rea to form the intent necessary to either (a) formulate the intent to commit a crime or (b) have the intent transferred to his action.

He then argues that “[m]ore importantly, more than just a retrospective result is required to be criminally liable.” He further argues that his “original conduct was not a crime. Therefore, it was only regarded as a crime retrospectively. Creating a crime of his innocent conduct, again retrospectively. Criminal statutes may not look retrospectively to determine criminality. Criminality must exist at the time the conduct was committed, never after.”

¶32 We conclude that Watson fails to make a cogent argument for why the statute is ex post facto, and we reject his argument. In *State v. Thiel*, 188 Wis. 2d 695, 703, 524 N.W.2d 641 (1994), our supreme court stated that [w]e hold that an ex post facto law, prohibited by the Wisconsin Constitution, is any law: which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed[.]

(Citation omitted and internal quotations omitted.)

¶33 Applying the holding in Thiel to the facts in this case, we conclude that WIS. STAT. § 939.48(3) is not an unconstitutional ex post facto law. As the State points out, in its current form, § 939.48(3) was enacted in 1988 by 1987 Wis. Act 399, § 472zkbm, effective January 1, 1989. The statute, in relevant part, provides that:

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 ... first-degree or 2nd degree reckless homicide, homicide injury by negligent handling of a dangerous weapon ... the actor is liable for whichever one of those crimes is committed. Sec. 939.48(3) (emphasis added). Pursuant to the statute, as relevant to the facts in this case, the “privilege of self-defense” does not extend to unintended infliction of harm upon a third person if the unintended infliction of harm amounts to homicide by negligent handling of a dangerous weapon, which is the crime that Watson was convicted of, and therefore, Watson is liable for committing that crime.

¶34 WISCONSIN STAT. § 939.48(3) was effective as of January 1, 1989—thirty-one years prior to Watson committing the crime on April 6, 2020. Thus, when he committed the crime of negligent handling of a dangerous weapon, his conduct was not innocent because the privilege of self-defense did not extend to his shooting Lattimore. Watson’s conduct constituted a crime at the time he unintentionally shot Lattimore, who was an unintended third person under the statute. Thus, we conclude that § 939.48(3) was not an ex post facto law at the time Watson shot

Lattimore, and therefore, he was properly convicted of the crime of negligent handling of a dangerous weapon.

¶35 Watson couches his allegation in terms of trial counsel being ineffective for not challenging the statute as being an ex post facto law. Because we conclude that the statute is not an ex post facto law, any challenge to the constitutionality of the statute would be futile.

¶36 It is not deficient performance for trial counsel to not pursue futile arguments. See *Cameron*, 370 Wis. 2d 661, ¶27 (“It is not deficient performance for counsel not to make a pointless objection.”); *Toliver*, 187 Wis. 2d at 360 (stating that counsel is not ineffective for failing to pursue futile arguments). It is also not prejudicial for trial counsel to have not raised a legal challenge to the statute if he could not establish that the challenge would have succeeded. See *Jackson*, 229 Wis. 2d at 344 (discussing that counsel’s failure to present legal challenge is not prejudicial if defendant cannot establish challenge would have succeeded).

¶37 Thus, we conclude that because any challenge to the constitutionality of WIS. STAT. § 939.48(3) on the grounds that it was an ex post facto law would have been futile, Watson has not shown that trial counsel was ineffective in failing to pursue that futile argument.

CONCLUSION

¶38 For the reasons stated above, we conclude that Watson could not claim a privilege of self-defense, pursuant to WIS. STAT. § 939.48(3), as to the homicide by

negligent handling of a dangerous weapon that he was convicted of where he unintentionally shot and killed Lattimore. Thus, we conclude that the circuit court properly instructed the jury that Watson did not have a privilege of self-defense as to shooting and killing Lattimore, and therefore, trial counsel was not ineffective in not objecting to the jury instructions. We also conclude that § 939.48(3) is not unconstitutionally vague and is not an ex post facto law.

¶39 We, therefore, affirm the judgment and order of the circuit court and postconviction court.

S/ By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

Case 2022AP001449 02-22-2024 Order

Filed 02-22-2024

OFFICE OF THE CLERK

110 EAST MAIN STREET, SUITE 215

P.O. Box 1688

MADISON, WI 53701-1688

To:

Hon. David L. Borowski

Circuit Court Judge

Electronic Notice

Anna Hodges

Clerk of Circuit Court

Milwaukee County Safety Building

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February 22, 2024

A31

Peter Anderson

Electronic Notice

Anne Christenson Murphy

Electronic Notice

You are hereby notified that the Court has entered the following order:

No. 2022AP1449-CR State v. Watson, L.C.#2020CF1459

02-22-2024

CLERK OF WISCONSIN

SUPREME COURT

A petition for review pursuant to Wis. Stat. § 808.10 having been filed on behalf of defendant-appellant-petitioner, Henry L. Watson, and considered by this court; IT IS ORDERED that the petition for review is denied, without costs.

S/ Samuel A. Christensen

Clerk of Supreme Court

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

HENRY L. WATSON, III,

Petitioner,

V.

Case no.24-cv-400

BRADLEY MLODZIK¹,

Respondent.

DECISION AND ORDER

Henry L. Watson, III shot two men in the parking lot of a Milwaukee auto parts store. Watson shot Tyrese Barnes twice, and Barnes survived.

State v. Watson, 2023 WI App 62, ¶ 2, 409 Wis. 2d 766, 998 N.W.2d 851, 2023 Wisc. App. LEXIS 1042. Watson shot Javon Lattimore four times, and Lattimore died as a result. Id.

The incident began with a confrontation between Watson and Barnes. Fearing that Barnes had a gun, Watson took out his own gun and began firing. The jury accepted Watson's claim of self-defense and acquitted him of the charges related to shooting Barnes. But as to Lattimore, who was working under a car at

the time and not involved in the confrontation between Watson and Barnes, the jury found Watson guilty of homicide by negligent handling of a dangerous weapon. (ECF No. 13-1 at 2.)

After unsuccessfully challenging his conviction in state court, Watson filed a petition for a writ of habeas corpus. (ECF No. 1.) He subsequently withdrew all but two of his claims. (ECF Nos. 21, 22.) The two remaining both relate to the jury instructions. First, he claims that the trial court failed to properly instruct the jury. Second, he claims that his trial counsel was ineffective for failing to object to the jury instructions. (ECF No. 1 at 6-8.) The respondent argues that Watson procedurally defaulted his claims by failing to develop them in the state courts. (ECF No. 20.) Notwithstanding his alleged procedural default, the court considers the merits of Watson's claims. See 28 U.S.C.

§ 2254(b)(2).

A person incarcerated pursuant to a state court judgment who seeks habeas relief in federal court faces a high hurdle. *Turner v. Brannon-Dortch*, 21 F.4th 992, 995 (7th Cir. 2022). A habeas petitioner is entitled to relief only if "the state court's decision was 'contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court.'" *Turner*, 21 F.4th at 995 (quoting 28 U.S.C.

§ 2254(d)(1)). "This standard is difficult to meet." *Id.* (quoting *Mays v. Hines*, 141 S. Ct. 1145, 1149 (2021) (*per curiam*)).

Habeas relief is "not a substitute for ordinary error correction through appeal." *Harrington v. Richter*, 562 U.S. 86, 102-03 (2011). Rather, it is reserved for "extreme malfunctions in the state criminal justice systems." *Id.* at 103 (quoting *Jackson v. Virginia*, 443 U.S. 307, 332, n. 5 (1979) (Stevens, J., concurring in judgment)). Thus, a petitioner is not entitled to relief merely by showing that the state court's decision was wrong. The petitioner must show that the state court's decision was so wrong as to be unreasonable. *Mays*, 141 S. Ct. at 1149. A decision is unreasonable only if "there is no possibility Fair minded jurists could disagree that the state court's decision conflicts with [the Supreme] Court's precedents." *Harrington*, 562 U.S. at 102.

Claims of ineffective assistance of counsel are governed by the well-established two-prong approach set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *Hicks v. Hepp*, 871 F.3d 513, 525 (7th Cir. 2017).

A petitioner must demonstrate both that his attorney's performance was deficient and that he was prejudiced as a result. *Id.* at 525-26. The first prong "requires that the petitioner demonstrate that counsel's representation fell below an objective standard of reasonableness." *Id.* at 525. "What is objectively reasonable is determined by the prevailing professional norms." *Id.*

But there is a wide range of permissible conduct, and "counsel is strongly presumed to have

rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* (quoting *Strickland*, 466 U.S. at 690). The prejudice prong "requires the petitioner to demonstrate a 'reasonable probability that, but for counsel's unprofessional errors,' the outcome would have been different." *Id.* At 526 (quoting *Knowles v. Mirzayance*, 556 U.S. 111, 127 (2009)).

When a claim of ineffective assistance of counsel is presented in a habeas petition, the petitioner faces "a high hurdle." *Hicks*, 871 F.3d at 525. "The Supreme Court has instructed that under these circumstances, [the federal court] must employ a 'doubly deferential' standard, one which 'gives both the state court and the defense attorney the benefit of the doubt.'" *Id.* (quoting *Burt v. Titlow*, 571 U.S. 12, 15 (2013)).

At the heart of Watson's claims is his assertion that, if he "was acting lawfully in self-defense, his conduct did not create an unreasonable risk to another." (ECF No. 14 at 5.) In other words, he argues that he could not have been acquitted of some charges on

the basis of self-defense and also convicted of negligent homicide. He asserts that the trial court erred because it "failed to advise the jury [that] criminal negligence and

lawful actions in self defense cannot coexist." (ECF No. 14 at 6.)

Watson's premise is incorrect and inconsistent with Wisconsin law. See Wis. Stat. § 939.48(3) 2. A person privileged to act in self-defense is not permitted to do so

negligently. See Wis. Stat. § 939.48(3)². A person who fires a gun in self-defense may not, for example, do so wildly or aimlessly. A person who did so could be lawfully convicted for negligently injuring a bystander while simultaneously being acquitted on the basis

of self-defense for any injury to his attacker. This is distinct from the situation where a shot fired in self-defense innocently goes astray and happens to strike a bystander.

Provided the shot was reasonable (i.e., not at least negligent), the right to self-defense will preclude conviction. See Wis. Stat. § 939.48(3).

It is for the jury to decide whether someone's conduct was a reasonable act that accidentally injured a bystander or whether it was a crime.

Watson reads too much into the commentary on Wisconsin's pattern jury instruction regarding self-defense, WIS JI -CRIM. 801, which states that "criminal negligence and lawful actions in self-defense cannot coexist." The statement (which does not have the force of law) is, at a minimum, incomplete in that it does not account for incidents involving multiple potentially criminal acts. When a person fires multiple shots, a jury may appropriately find that some of those shots were in

self-defense and others were criminally negligent. And that is what the jury apparently found here . The

jury found, in effect, that the two shots that struck Barnes were privileged acts of self-defense, but the four shots that struck Lattimore were criminally negligent.

Self-defense (and criminal liability) is assessed with respect to individual acts (e. g., each shot Watson

fired) and not as to an incident overall (e.g., the entire span of events that occurred in the parking lot).

There was no evidence that Lattimore posed any threat to Watson. Therefore, Watson was not entitled to a self-defense instruction regarding Lattimore's death, and

the state was not required to negate that affirmative defense beyond a reasonable doubt to convict him of negligent homicide. Self-defense was an issue only with respect to the shooting of Barnes. Watson's actions defending himself against Barnes were relevant to

the death of Lattimore only insofar as Watson acted reasonably in firing the shots that struck Lattimore. See Wis. Stat. § 939.48(3). But the jury rejected that argument, finding that Watson was criminally negligent in causing the death of Lattimore.

Because there was no error with respect to the jury instructions or the jury's verdict, Watson was not denied the effective assistance of counsel. Therefore, the court must deny Watson's petition.

Even if the court were to consider the claims that Watson withdrew, the court would find no basis for habeas relief. The relevant statute, Wis. Stat. § 939.48(3), is not

unconstitutionally vague. It merely codifies the basic principle that a person who acts in self-defense is not immune for contemporaneous criminal acts. The lawful bounds of a person's conduct under the statute are no more vague than those inherent in any proscription of criminal negligence. The statute did not relieve the government of its burden to disprove the affirmative defense of self-defense because Watson did not have

a plausible claim of self-defense as to Lattimore. Self-defense was relevant not as an affirmative defense but only as a factor in determining the reasonableness of Watson's actions. Thus, the state had to (and did) prove beyond a reasonable doubt that, despite the privilege to use self-defense as to the risk posed by Barnes, Watson's conduct created an unreasonable and substantial risk of death as to Lattimore. Watson's assertion that Wis. Stat. § 939.48(3) is an unconstitutional *ex post facto* law is without merit. As the Wisconsin Court of Appeals noted, the

statute long predated the incident that gave rise to Watson's conviction. *State v. Watson*, 2023 WI App

62, 409 Wis. 2d 766, 998 N.W.2d 851. The statute did not retroactively criminalize any lawful conduct. Watson's argument simply does not fit within the bounds of an ex post facto law claim.

Finally, the trial judge's post-verdict communication with the jury—a routine procedure for many judges—did not implicate a probability of actual bias such that recusal was required. See *Suh v. Pierce*, 630 F.3d 685, 691 (7th Cir. 2011).

Because the court finds that it must deny Watson's petition, it must consider whether to grant him a certificate of appealability. See Rule 11, Rules Governing Section 2254 Cases. The court may issue a certificate of appealability "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This requires more than showing merely that an appeal would not be frivolous. *Miller-El v. Cockrell*, 537 U.S. 322, 338 (2003). But this standard does not require that the applicant to show that some judges would grant the petition. *Id.* Rather,

when the court has denied the petition on its merits, "[t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Id.* (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

The certificate of appealability "shall indicate which specific issue or issues satisfy the showing required by [28 U.S.C. § 2253(c)(2)]. " The court concludes that Watson has failed to make a substantial showing of a denial of constitutional right. See 28 U.S.C. § 2253(c)(2); Rule 11 of the Rules Governing Section 2254 Cases. Therefore, the court will deny him a certificate of appealability.

IT IS THEREFORE ORDERED that Watson's petition for a writ of habeas corpus is denied. The petition and this action are dismissed. The court further denies a certificate of appealability. The Clerk shall enter judgment accordingly.

Dated at Milwaukee, Wisconsin this 19th day of August, 2024.

S/ William E. Duffin

U.S . Magistrate Judge

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

Submitted September 3, 2025

Decided September 12, 2025

Before

FRANK H. EASTERBROOK, Circuit Judge

MICHAEL Y. SCUDDER, Circuit Judge

No. 24-2498

HENRY L. WATSON, III,

Petitioner-Appellant,

V.

BRADLEY MLODZIK,

Respondent-Appellee.

Appeal from the United States District

Court for the Eastern District of Wisconsin.

No. 24-CV-400

William E. Duffin,

Magistrate Judge.

ORDER

Henry Watson has filed a notice of appeal from the denial of his petition under 28 U.S.C. § 2254 and an application for a certificate of appealability. We have reviewed the final order of the district court and the record on appeal. We find no substantial showing of the denial of a constitutional right. See 28 U.S.C. § 2253(c)(2). Accordingly, Watson's request for a certificate of appealability is denied.

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

September 26, 2025

No. 24-2498

HENRY L. WATSON, III,

Petitioner-Appellant,

V.

BRADLEY MLODZIK,

Respondent-Appellee.

Before

FRANK H. EASTERBROOK, Circuit Judge MICHAEL Y. SCUDDER, Circuit
Judge Appeal from the United States District Court for the Eastern District of
Wisconsin.

No. 24-CV-400

William E. Duffin, Magistrate Judge.

ORDER

A44

Petitioner-Appellant filed a petition for rehearing on September 25, 2025. All the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

JURY INSTRUCTION TRIAL TRANSCRIPTS

1 MR. HUEBNER: Can I go to the bathroom?

2 THE COURT: Sure.

3 (Proceedings in recess)

4 (Whereupon, the jury panel was present

5 in the courtroom.)

6 "THE COURT": Welcome back, everybody. Good

7 morning. Thanks for being back on time.

8 As I said yesterday, I had to discuss a

9 couple of things with the lawyers and get a few things in

10 order, including the jury instructions. The instructions

11 are in order. I'm going to read you the jury

12 instructions. Candidly, they're fairly long. I mean

13 it's probably going to take me at least half an hour to

14 read them to you.

15 You do not have to memorize them. There

16 won't be a quiz ten minutes after I'm done talking. The

17 instructions will go back to the jury room with
18 you who are, ultimately, on the panel, and certainly you
19 should, if you need to, and most likely at some point you
20 will, refer to the jury instructions while you're
21 deliberating.

22 After I read about 90 percent of the
23 instructions, both sides will make closing arguments
24 After they make their closing arguments, I'll excuse two
25 of you randomly. After I excuse the two people randomly,
1 I have another couple of instructions, and then the case
2 will be submitted to the remaining 12 for deliberations.
3 By the time I read these, and both sides do
4 their closing arguments, it will probably be 11:00,
5 11:15, somewhere in there, which means you most likely,
6 almost certainly you'll be deliberating through the lunch
7 hour. While the accommodations around the courthouse are
8 somewhere between spartan and terrible, you do still
9 shockingly get lunch paid for by the county, so we'll.

10 order lunch for the people that are deliberating.

11 ladies and gentlemen, members of the jury,

12 as I said I will now instruct you on the principals of

13 law, which you are. obligated to follow in considering the

14 evidence and in reaching your verdicts.

15 It is your duty to follow all of these

16 instructions. Regardless of any opinion you may have

17 about what the law is or ought to be, you must base your

18 verdicts on the law that I give you in these

19 instructions. Apply the law to the facts in the case,

20 which have been properly proven by the evidence.

21 Consider only the evidence that was received during the

22 trial and the law as given to you by these instructions,

23 and from these alone, guided by your soundest reason and

24 judgment, reach your verdict.

25 If any member of the jury, if any of you has

1 an impression of my opinion as to whether the defendant

2 is guilty or not guilty, you are to disregard that

3 impression entirely and decide the issues of fact solely

4 as you view the evidence. You, the jury, are the sole

5 judges of the facts. The court is the judge of the law

6 only.

7 'As you know in this case, there's one

8 defendant and two counts or two charges. The first count

9 of the information charges and alleges that the defendant

10 in this case did on or about April 6th of 2020 at 4810

11 North Teutonia Avenue in Milwaukee, Milwaukee County, did

12 recklessly cause the death of Javon Lattimore, another

13 human being, under circumstances that showed utter

14 disregard for human life contrary to the Wisconsin

15 Statutes. To this charge the defendant has plead not

16 guilty, which means the state must prove every element of

17 the charged offense beyond a reasonable doubt.
18 . 'As far as Count ,1, there are crimes to
19 consider. As you know the defendant in this case is
20 charged with first-degree reckless homicide, and you must
21 , first consider whether the defendant is guilty of that
22 offense. If, ultimately, you're not satisfied that the
23 defendant is guilty of first-degree reckless homicide,
24 you must then consider whether or not the defendant is
25 guilty of second-degree reckless homicide, which is a

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1 less serious degree of criminal,homicide.
2 If you are not satisfied the defendant is
3 guilty of second degree reckless homicide, you must
4 consider whether or not the .defendant is guilty of

5 homicide by negligent handling of a dangerous weapon,
6 which is also a less serious degree of criminal homicide.
7 Those three crimes are referred to as
8 first-degree reckless homicide, second-degree reckless
9 homicide and homicide by negligent handling of a
10 dangerous weapon. Those are varying degrees of homicide.
11 Homicide, as you've heard, is the taking of the life of
12 another human being. The degree of homicide defined by
13 the law depends on the facts and circumstances of each
14 particular case.
15 Reckless homicide. While the law separates
16 reckless homicides into two degrees, there are certain
17 elements which are common to each crime. Both first and
18 second-degree reckless homicide require that the
19 defendant caused the death of the victim by criminally
20 reckless conduct. First-degree. reckless homicide
21 requires the State to prove the additional fact that the
22 circumstances of the defendant's conduct showed utter

23 disregard for human life.

24 Homicide by the negligent handling of a

25 dangerous weapon requires that the defendant caused the

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1 death of the victim with criminally negligent conduct in

2 the operation or handling of a dangerous weapon.

3 It is for you to decide of what degree of

4 homicide the defendant is guilty, if guilty at all,

5 according to the instructions which define these

6 offenses.

7 Definition of crimes. First-degree reckless

8 homicide, as defined in the Wisconsin Criminal Code, is

9 committed by one who recklessly causes the death of

10 another human being under circumstances that show utter

11 disregard for human life.

12 Before you may find the defendant guilty of

13 first-degree reckless homicide, the State must prove by

14 evidence, which satisfies you beyond a reasonable doubt,

15 that the following three elements were present.

16 Self-defense as to Tyrese Barnes. There is

17 evidence in this case that the defendant was acting in

18 self-defense as to Tyrese Barnes. The fact that the law

19 may allow the defendant to use force in self-defense as

20 to Tyrese Barnes, does not necessarily mean that the

21 causing of harm to Javon Lattimore was lawful. You must

22 consider the law of self-defense in deciding whether the

23 defendant's conduct as to Tyrese Barnes was criminally

24 reckless conduct which showed utter disregard for humnn

25 life, or was criminally reckless conduct, but the

1 defendant does not have a privilege of self-defense as to

2 Javon lattimore.

3 The law of Self-defense allows the defendant

4 to threaten or intentionally use force against another

5 only if the defendant believed that there was an actual

6 or imminent unlawful interference with the defendant's

7 person, and the defendant believed that the amount of

8 force he used or threatened to use was necessary to

9 prevent or terminate the interference and the defendant's

10 :beliefs were reasonable.

11 The defendant may intentionally use force,

12 which is intended or likely to cause. death or great

13 bodily harm only if the defendant reasonably believed

14 that that force was necessary or the force used was

15 necessary to prevent imminent death or great bodily harm

16 to himself.

17 Determining whether beliefs were reasonable.

18 A :belief may be reasonable even though mistaken. In

19 determining whether the defendant's belief was

20 reasonable, the standard is what a person of ordinary

21 intelligence and prudence would have believed in the

22 defendant's position under the circumstances that existed

23 at the time of the offense. The reasonableness of the

24 defendant's beliefs must be determined from the

25 standpoint of the defendant at the time of his acts and

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1 not from the viewpoint of the jury now.

2 Retreat. There's not a duty to retreat.

3 However, in determining whether the defendant reasonably

4 believed the amount of force used was necessary to

5 prevent or terminate the interference, you may consider
6 whether the defendant had the opportunity to retreat with
7 safety, whether a retreat was feasible, and whether the
8 defendant knew of the opportunity to retreat.

9 The elements of the crime that the State

10 must prove are as follows: One, the defendant caused the
11 death of Javon Lattimore. Cause means the defendant's
12 act or action was a substantial factor in producing the
13 death; two, the defendant caused the death with
14 criminally reckless conduct. Criminanlly reckless conduct
15 means the conduct created a risk of death or great bodily
16 harm to another person, and the risk of death or great
17 bodily harm was unreasonable and substantial, and the
18 defendant was aware that his conduct created the
19 unreasonable and substantial risk of death or great
20 bodily harm.

21 You should consider the evidence relating to
22 self-defense along with the other evidence in the case in

23 deciding whether the defendant's conduct created an
24 unreasonable risk of death or great bodily harm to Javon
25 Lattimore. If the defendant was acting lawfully in

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1 self-defense, his conduct did not create an unreasonable
2 risk to another. The burden is on the State to prove
3 beyond a reasonable doubt that the defendant did not act
4 lawfully in self-defense, and you must be satisfied
5 beyond a reasonable doubt, from all the evidence in the
6 case, that the risk was unreasonable.
7 And, three, the third element the State
8 needs to prove is that the circumstances of the
9 defendant's conduct showed utter disregard for human
10 life.

11 In determining whether the circumstances of
12 the conduct showed utter disregard for human life,
13 consider these factors: What the defendant was doing;
14 why the defendant was engaged in that conduct; how
15 dangerous the conduct was; how obvious the danger was;
16 whether the conduct showed any regard for life, and all
17 other facts and circumstances relating to the conduct.
18 Consider also the defendant's conduct after
19 the death to the extent that it helps you decide whether
20 or not the circumstances showed utter disregard for human
21 life at the time the death occurred. You should consider
22 the evidence relating to self-defense in deciding whether
23 the circumstances of the defendant's conduct showed utter
24 disregard for human life.
25 The burden is on the State to prove beyond a

1 reasonable doubt that the defendant did not act lawfully

2 in self-defense, and you must be satisfied beyond a

3 reasonable doubt from all the evidence in the case that

4 the circumstances of the defendant's conduct showed utter

5 disregard for human life.

6 If you are satisfied beyond a reasonable

7 doubt that the defendant caused the death of Javon

8 I.attimore by criminally reckless conduct, and that the

9 circumstances of the conduct showed utter disregard for

10 human life, you should find the defendant guilty of

11 first-degree reckless homicide. If you are not so

12 satisfied, you must not find the defendant guilty of

13 first-degree reckless homicide.

14 Then, you should consider whether the

15 defendant is guilty of second-degree reckless homicide in

16 violation of the Criminal Code of Wisconsin, which is a

17 lesser-included. offense of first-degree reckless

18 homicide.

19 You should first make every reasonable

20 effort to agree unanimously with the charge of

21 first-degree reckless homicide before considering the

22 offense of second-degree reckless homicide. However, if

23 after a full and complete consideration of the evidence

24 you conclude that further deliberations would not result

25 in a unanimous agreement on the charge of first-degre

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1 reckless homicide, you then should consider whether the

2 defendant is guilty of second-degree reckless homicide.

3 Second-degree reckless homicide, as defined in the

4 Wisconsin Criminal Code, is committed by one who

5 recklessly causes the death of another human being.

6 The difference between first and

7 second-degree reckless homicide. The difference between

8 first and second-degree reckless homicide is that the

9 first-degree offense requires the proof of one additional
10 element: That the circumstances of the defendant's
11 conduct showed utter disregard for human life.
12 If you are satisfied beyond a reasonable
13 doubt that all the elements of first-degree reckless
14 homicide were present, except the element requiring that
15 the conduct showed utter disregard for human life, you
16 should find the defendant guilty then of second-degree
17 reckless homicide. In other words, if you are satisfied
18 beyond a reasonable doubt that the defendant caused the
19 death of Javon Lattimore by criminally reckless conduct,
20 you should find the defendant guilty of second-degree
21 reckless homicide.

22 Again, you need to make every reasonable
23 effort to agree. Please make every reasonable effort to
24 agree unanimously on the charge of second-degree reckless
25 homicide before considering the offense of homicide by

1 negligent handling of a dangerous weapon.

2 However, if after a full and complete

3 consideration of the evidence, you conclude that further

4 deliberations would not result in a unanimous agreement

5 on the charge of second-degree reckless homicide, then

6 and only then you should consider whether the defendant

7 is guilty of homicide by negligent handling of a

8 dangerous weapon.

9 Homicide by negligent handling of a

10 dangerous weapon as defined in the Wisconsin Criminal

11 Code is committed by one who causes the death of another

12 human being by the negligent operation or handling of a

13 dangerous weapon.

14 The burden of proof. Before you may find

15 the defendant guilty of this offense, the State must

16 prove by evidence which satisfies you beyond a reasonable

17 doubt that the following three elements were present:

18 One, the defendant operated or handled a dangerous
19 weapon; two, the defendant operated or handled a
20 dangerous weapon in a manner constituting criminal
21 negligence; and, three, the defendant's operation or
22 handling of a dangerous weapon in a manner constituting
23 criminal negligence caused the death of Javon Lattirrore.
24 Cause means the defendant's act or action
25 was a substantial factor in producing the death. You

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1 should consider the evidence relating to self-defense,
2 along with all the other evidence in deciding whether the
3 defendant's conduct constituted criminal negligence.

4 Dangerous weapon. A dangerous weapon is a
5 fire arm, whether loaded or unloaded. A firearm is a
6 weapon that acts with the force of gunpowder;

7 Criminal negligence. Criminal negligence
8 means the defendant's operation or handling of a

9 dangerous weapon created a risk of death or great bodily
10 harm. The risk of death or great bodily harm was
11 unreasonable and substantial, and the defendant should
12 have been aware that his operation or handling of a
13 dangerous weapon created the unreasonable and substantial
14 risk of death or great bodily harm.

15 The difference between criminal recklessness
16 and criminal negligence. Criminal recklessness and
17 criminal negligence both require conduct that creates an
18 unreasonable and substantial risk of death or great
19 bodily harm. Criminal recklessness requires that the
20 person engaging in the conduct be aware of that risk
21 while criminal negligence requires that the person
22 engaging in that conduct should have been aware of the
23 risk.

24 If you are satisfied beyond a reasonable
25 doubt that the defendant caused the death of Javon

1 Lattimore by criminal negligence in the operation or
2 handling of a dangerous weapon, you should find the
3 defendant guilty. If you are not so satisfied, you must
4 find the defendant not guilty.

5 You are not, in any event, to find the
6 defendant guilty of more than one offense. Again, you
7 are not, in any event, to find the defendant guilty of
8 the more than one offense as to Count 1.

9 The second count of the information charges
10 and alleges that on or about Monday, April 6th of last
11 year, the defendant did at 4810 North Teutonia Avenue in
12 Milwaukee, Milwaukee County, did recklessly cause great
13 . bodily harm to Tyrese Barnes, another human being, under
14 circumstances that showed utter disregard for human life
15 contrary to the Wisconsin Statutes.

16 To this charge the defendant has also plead
17 not guilty, which means the State must prove every

18 element of the charged offense beyond a reasonable doubt.

19 First-degree reckless injury. First-degree

20 reckless injury as defined in the Wisconsin Criminal Code

21 is committed by one who recklessly causes great bodily

22 harm to another human being under circumstances that show

23 utter disregard for human life.

24 Self-defense. Self-defense is an issue in

25 this case. The law of self-defense allows the defendant

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1 to threaten or intentionally use force against another

2 only if the defendant believed that there was an actual

3 or imminent unlawful interference with the defendant's

4 person, and the defendant believed that the amount of

5 force the defendant used or threatened to use was

6 necessary to prevent or terminate the interference, and

7 the defendant's beliefs were reasonable.

8 The defendant may intentionally use force,

9 which is intended or likely to cause death or great
10 bodily hann only if the defendant reasonably believed
11 that the force was necessary to prevent imminent death or
12 great bodily harm to himself.
13 A belief may be reasonable even though it's
14 mistaken.. In determining whether the defendant's beliefs
15 were reasonable, the standard is when a person of
16 ordinary intelligence and prudence would have believed in
17 the defendant's position under the circumstances that
18 existed at the time of the alleged offense.
19 The reasonableness of the defendant's
20 beliefs must be determined from the standpoint of the
21 defendant at the time of the actions and not from the
22 viewpoint of the jury now.
23 Retreat. There's not a duty to retreat.
24 However, in determining whether the defendant reasonably
25 believed the amount of force used was necessary to

1 prevent or terminate the interference, you may consider

2 whether the defendant had the opportunity to retreat with

3 safety, if the retreat was feasible, and whether the

4 defendant knew of the opportunity to retreat.

5 Before you may find the defendant guilty of

6 first-degree reckless injury, the State must prove by

7 evidence which satisfies you beyond a reasonable doubt

8 that the following three elements were present, and the

9 defendant did not act in self-defense.

10 The elements, one, the defendant caused

, 11 great bodily harm to Tyrese Barnes. Cause means the

12 defendant's act was a substantial factor in producing

13 great bodily harm. Great bodily harm means injury which

14 creates a substantial risk of death or which causes

15 serious, permanent disfigurement or which causes a

16 permanent or protracted loss or impairment of the

17 function of any bodily member or organ or other serious

18 bodily injury.

19 Two, the second element is that defendant

20 caused great bodily harm by criminally reckless conduct.

21 Criminally reckless conduct means the defendant created a

22 risk of death or great bodily harm to another person, and

23 the risk of death or great bodily harm was unreasonable

24 and substantial, and the defendant was aware that his

25 conduct created the unreasonable and substantial risk of

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1 death or great bodily harm.

2 You should consider the evidence relating to

3 self-defense in deciding whether the defendant's conduct

4 created an unreasonable risk to another. If the

5 defendant was acting lawfully in self-defense, his

6 conduct did not create an unreasonable risk to another.

7 The burden is on the state to prove beyond a reasonable

8 doubt that the defendant did not act lawfully in

9 self-defense, and you must be satisfied beyond a
10 reasonable doubt from all the evidence in the case that
11 the risk was unreasonable.

12 Three, the third element, the circumstances
13 of the defendant's conduct showed utter disregard for
14 human life. In determining the circumstances or whether
15 the circumstances of the conduct showed utter disregard
16 for human life, consider these factors: What the
17 defendant was doing; why the defendant was engaged in
18 that conduct; how dangerous the conduct was; how obvious
19 the danger was; whether the conduct showed any regard for
20 life, and all other facts and circumstances relating to
21 the conduct.

22 You should consider the evidence relating to
23 self-defense in deciding whether the circumstances of the
24 conduct showed utter disregard for human life. The
25 burden is on the State to prove beyond a reasonable doubt

820 WIS JI-CRIMINAL 820

820 PRIVILEGE: SELF~DEFENSE: INJURY TO THIRD PARTY CHARGED
AS RECKLESS OR NEGLIGENT CRIME - § 939.48(3)

INSERT THE FOLLOWING AFTER THE FIRST PARAGRAPH OF THE
INSTRUCTION ON THE CRIME CHARGED BUT BEFORE THE ELEMENTS
OF THE CRIME ARE DEFINED.

Self-Defense As To (Name Person)

There is evidence in this case that the defendant was acting in self-defense as to (name person)¹. The fact that the law may allow the defendant to use force in self-defense as to (name person) does not necessarily mean that the causing of harm to (name victim)² was lawful. You must consider the law of self-defense in deciding whether the defendant's conduct as to (name victim) [was criminally reckless conduct which showed utter disregard for human life] [was criminally reckless conduct] [was criminally negligent conduct], but the defendant does not have a privilege of self-defense as to (name victim). The law of self-defense allows the defendant to threaten or intentionally use force against another only if:

- the defendant believed that there was an actual or imminent unlawful interference with the defendant's person; and,
- the defendant believed that the amount of force (he) (she) used or threatened to use was necessary to prevent or terminate the interference; and,
- the defendant's beliefs were reasonable.

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ADD THE FOLLOWING IF THERE IS EVIDENCE THAT THE FORCE USED

WAS INTENDED OR LIKELY TO CAUSE DEATH OR GREAT BODILY
HARM.

[The defendant may intentionally use 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 (himself) (herself).]

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) (her) acts and not from the viewpoint of the jury now.

IF RETREAT IS AN ISSUE, ADD APPROPRIATE INSTRUCTION HERE-SEE
WIS JI-CRIMINAL 810.

IF THERE IS EVIDENCE THAT THE DEFENDANT PROVOKED THE
ATTACK, ADD APPROPRIATE INSTRUCTION HERE - SEE WIS
JI-CRIMINAL 815.

CONTINUE WITH THE DEFINITION OF THE ELEMENTS OF THE CRIME.
FOR ALL OFFENSES INVOLVING CRIMINAL RECKLESSNESS OR

CRIMINAL NEGLIGENCE, ADD THE FOLLOWING TO THE DEFINITION OF THE RECKLESSNESS OR NEGLIGENCE ELEMENT:

You should consider the evidence relating to self-defense along with all the other evidence in the case in deciding whether the defendant's conduct created an unreasonable risk of death or great bodily harm to (name victim). If the defendant was acting lawfully in self-defense, (his) (her) conduct did not create an unreasonable risk to another. The burden is on the state to prove beyond a reasonable doubt that the defendant did not act lawfully in self-defense. And, you must be satisfied beyond a reasonable doubt from all the evidence in the case that the risk was unreasonable.³

FOR FIRST DEGREE RECKLESS OFFENSES ALSO ADD THE FOLLOWING TO THE DEFINITION OF THE "UTTER DISREGARD" ELEMENT:

[You should consider the evidence relating to self-defense in deciding whether the circumstances of the defendant's conduct showed utter disregard for human life. The burden is on the state to prove beyond a reasonable doubt that the defendant did not act lawfully in self-defense. And, you must be satisfied beyond a reasonable doubt from all the evidence in the case that the circumstances of the defendant's conduct showed utter disregard for human life.]⁴

CONCLUDE WITH THE CONCLUDING PARAGRAPHS FROM THE INSTRUCTION FOR THE OFFENSE CHARGED.

COMMENT

Wis JI-Criminal 820 was originally published in 1962 and revised in 1994 and 2006. This revision was approved by the Committee in December 2017. This instruction is intended to implement § 939.48(3), which provides as follows:

(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.

The original version of Wis JI-Criminal 820 paraphrased the statute, explaining that the privilege of self-defense extended to the unintended infliction of harm to a third party, unless that infliction amounted to a crime involving what was formerly called "conduct regardless of life," reckless conduct, or criminal negligence.

The 2006 revision modified that approach, based on the assumption that the issue will arise in the context of a charge based on causing harm to the third party by criminally reckless or criminally negligent conduct. In that context, the Committee concluded that the preferred approach is to relate the defendant's exercise of the privilege to the establishment of the elements of the recklessness-based or negligence-based crime. Thus, the substance of this instruction is borrowed from Wis JI-Criminal 801, Privilege: Self-Defense: Force Less Than That Likely To Cause Death Or Great Bodily Harm: Crimes Involving Recklessness or Negligence.

For example, assume that a defendant is charged with causing reckless injury to the victim, and raises the defense that he was acting in self-defense against someone else and thereby injured the victim. Criminal recklessness requires that the defendant's conduct created "an unreasonable and substantial risk of death or great bodily harm." [See § 939.24.] In considering whether the risk was "unreasonable," the jury should consider the evidence that the defendant was acting in self-defense. [See Wis JI-Criminal 801.]

It is possible that a case could involve a charge based on intentional harm to the third person - as under a statute such as § 940.19(I), simple battery, which applies to causing bodily harm with intent to cause harm to that person or another. In such a case, conduct that is privileged as to its intended target is also privileged as to the unintended third person who is injured. Such harm is "unintended" as that term is used in § 939.48(3), but it is "intentional" under the substantive statutes that define crimes in terms of intending to harm "that person or another." For that case, see Wis JI-Criminal 821, which provides that to establish the crime against the unintended victim, the state must prove beyond a reasonable doubt that the defendant was not privileged in the use of force against the intended target of that force.

FOOTNOTES

1. Here, use the name of the person against whom the defendant intended to use force in self-defense.

2. Insert the name of the injured party, who is the victim of the crime charged.

3. The last two sentences of this paragraph were added in 2018 in response to the decision in *State v. Austin*, 2013 WI App 96,349 Wis.2d 744, 836 N.W.2d 833, in which the court of appeals ordered a new trial for a person convicted of 2nd degree recklessly endangering safety. The court held that the jury instructions given in that case - which followed the pattern suggested by Wis JI-Criminal 80 I - were deficient because they did not specifically state that the prosecution must prove the absence of self-defense once raised.

The same deficiency appeared in this instruction. The first of the added sentences is intended to make that requirement clear. The second added sentence is intended to emphasize that even if the state succeeds in proving the absence of self-defense, the jury still must be satisfied by all the evidence that the defendant's conduct created an unreasonable risk of death or great bodily harm.

4. The last two sentences of this paragraph were added in 2018 in response to the decision in *State v. Austin*, see note 3, supra. *Austin* was concerned with the "unreasonable risk" element of the offense, but the same concern should apply to the "utter disregard" element of 1st degree reckless offenses. The first of the added sentences is intended to make it clear that the prosecution must prove the absence of self-defense once raised to meet its burden to prove "utter disregard for human life." The second added sentence is intended to emphasize that even if the state succeeds in proving the absence of self-defense, the jury still must be satisfied by all the evidence that the circumstances of the defendant's conduct showed utter disregard for human life.

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