

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 17, 2026

Samuel A. Christensen
Clerk of Court of Appeals

NOTICE

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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. 2024AP811-CR
STATE OF WISCONSIN**

Cir. Ct. No. 2019CF2385

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LEEARTHUR L. TAYLOR,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: JOSANN M. REYNOLDS, Judge. *Affirmed.*

Before Blanchard, Kloppenburg, and Nashold, JJ.

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).

¶1 PER CURIAM. LeeArthur Taylor appeals a judgment of conviction and an order denying his postconviction motion for a new trial. Taylor was

convicted, following a jury trial, of first-degree reckless homicide with the use of a dangerous weapon as a party to the crime on the basis that he aided and abetted Larence Thomas in the shooting of Malik Moss. Taylor argues on appeal that the evidence was insufficient to support the jury verdict. He also argues that he received constitutionally ineffective assistance of trial counsel, challenges the circuit court's inadvertent omission of a sentence from the oral jury instructions, and argues that we should grant him a new trial in the interests of justice. We reject Taylor's arguments and affirm.

BACKGROUND

¶2 At the time of the shooting, Taylor was living with his mother, Brenda Parker. Taylor's younger brothers, Preston Taylor and Paris Parker, were also living in Brenda's apartment unit, as was Taylor's younger sister, China Parker.¹ Larence Thomas—who is Brenda's brother and Taylor's uncle—was also staying at the apartment.

¶3 Markeria Thomas is Taylor's cousin. Thomas is her uncle. Markeria and the victim, Moss, have a child together and they had previously been in a romantic relationship, but were no longer in that relationship by the time of the shooting.

¶4 The shooting took place in the parking lot outside of the apartment. Surveillance video of the parking lot and the area between the apartment and the parking lot captured the shooting and the events leading up to and following it,

¹ Because of the shared surnames, we refer to Taylor's siblings and his mother by their first names, and do the same with Taylor's cousin, Markeria Thomas, referenced below. Separately, at times we refer to Brenda's apartment unit as simply "the apartment."

although the video did not record audio. The surveillance footage, as explained through the testimony of several witnesses, and which the jury watched many times during the trial, showed the following.

¶5 Moss and two of his friends arrived together in a car, which they parked in the parking lot outside Brenda's apartment. After parking, they stood and walked around near the vehicle for a minute or so.

¶6 When Moss and his friends arrived, Thomas was already in the parking lot. Thomas was closer to the apartment, a short distance from where Moss and his friends had parked their car. After Moss and his friends arrived, Thomas stood and walked around in the parking lot and the surrounding area. Paris joined Thomas in the parking lot and the two walked between two vehicles. Out of the sight of Moss and his friends, Paris pulled a shotgun from the leg of his pants and hid it under one of the vehicles. Paris then left the parking lot while Thomas stayed there.

¶7 Several minutes after Moss and his friends arrived, and while they and Thomas were still in the parking lot, Markeria arrived. Thomas and Paris walked up to Markeria's vehicle. So did Moss, but not his friends. Moss, Thomas, and Paris were milling around between Markeria's vehicle and Moss's vehicle, appearing to exchange words, when Paris and Moss began fist fighting. After they started to fight, both Thomas and Taylor ran towards them from different directions. Thomas came from where he had been in the parking lot, and Taylor, holding a shotgun different from the shotgun Paris and Thomas had hidden earlier, came from where he had been between the parking lot and the apartment. Brenda and China followed just behind Taylor. As Paris and Moss were fighting, Thomas shot Moss with a handgun multiple times, and Moss fell to the ground,

got up, and stumbled to a grassy area next to the parking lot, where he collapsed. Moss's friends remained a short distance away and one of them fired a shot in the general direction of where Paris and Moss had been fighting, either before or after Thomas first shot Moss, but that round did not hit anyone.² Both of Moss's friends fled the area shortly after Moss was shot.

¶8 As stated, once Moss and Paris began fighting, Taylor ran towards Moss and Paris while holding a shotgun. Taylor had just reached Moss when Thomas began shooting, at which point Taylor ducked and retreated several steps. After Thomas shot Moss and fled, and as Moss was trying to escape, Taylor again advanced towards Moss and pointed the shotgun at him, before Taylor then turned around and walked back in the direction of the apartment. About four minutes after the shooting and before police arrived, Taylor got into a vehicle driven by his sister-in-law and left the scene. Video from a different surveillance camera shows that, before Paris and Moss began to fight, Taylor and Brenda were walking around outside in the area between the apartment and the parking lot, and Taylor was holding a shotgun at that time.

¶9 As relevant here, the testimony at trial included the testimony summarized below.

¶10 Markeria testified to the following. On the day of the shooting, Moss texted her to meet and discuss a schedule for when he could spend time with their son. Markeria wanted to arrange to meet in a public place because she was

² The video appears to show Moss's friend firing after Thomas first shot Moss. The timing was disputed at trial. For example, Thomas testified that Moss's friend shot first, but, as we later note, a detective testified, based on the surveillance video, that Moss's friend appeared to fire after Thomas first shot Moss.

afraid of Moss, who sometimes hit her, including on the day of the shooting, and because she was afraid of “the situation.” Markeria had not told Taylor, any of his siblings, Brenda, or Thomas about her problems with Moss. Markeria was aware that Moss had gone to Brenda’s apartment building a day or two before the shooting and that Moss, in the parking lot, had punched Taylor and knocked him out. Markeria was also aware that Taylor had said he had something that belonged to Moss, and that because Moss had knocked Taylor out, Moss would have to fight Taylor to get it back. Markeria believed the shooting was about revenge. Although Markeria had hoped to meet Moss in a public place, Moss came to her apartment and the two met in the parking lot. They discussed Moss having punched Taylor. After she and Moss discussed a schedule for when Moss could spend time with their son, Moss told Markeria that he was going to Brenda’s apartment building and Markeria followed Moss there in her vehicle. Markeria also testified about what the surveillance video showed, and her testimony was generally consistent with the video.

¶11 Police officers testified that Moss was taken to the hospital by ambulance but that he died before arriving. A crime scene investigator who attended Moss’s autopsy testified that five bullets were collected from Moss’s body. The medical examiner who performed Moss’s autopsy testified that Moss was shot eight times, and that the gunshot wounds caused Moss’s death.

¶12 A firearm and tool marks examiner with the Wisconsin State Crime Lab testified that the five bullets recovered from Moss’s body were fired from the same handgun. The examiner also testified that the shotgun that Taylor wielded was functional.

¶13 Detective Lisa Fahrenbruch testified as follows. Police recovered the shotgun that Taylor possessed during the shooting from bushes located next to another apartment building after Taylor told Fahrenbruch in an interview where the shotgun could be found. The shotgun was not loaded. In that same interview, Taylor said he had ammunition for the shotgun in his hand during the shooting, but that he dropped the ammunition. There was no evidence at the crime scene suggesting that Moss possessed a gun during the fight, and Moss's friend shot his gun only after Thomas began shooting Moss. In a search of Brenda's apartment after the shooting, shotgun shells that could have been used in the shotgun that Taylor possessed were found in the apartment.

¶14 Leeearthur Jones, Sr. testified to the following. Jones' wife is Taylor's cousin. On the day before the shooting, Jones had been at the apartment working on a vehicle. Jones talked with Taylor about Moss hitting Taylor in the face and Taylor said that he was not angry about it. After the shooting, Jones spoke with police, but Jones denied telling police that Taylor told Jones that Taylor was going to kill Moss when Taylor saw him.

¶15 After Jones testified, a video of statements that Jones had made to police during an interview were admitted as prior inconsistent statements. In those earlier statements, Jones told police that Taylor had told Jones that Taylor was going to kill Moss for punching Taylor in the face.

¶16 China was called by the defense and testified as follows. Moss and his friends all possessed guns when they arrived at the parking lot where the shooting occurred, but before Moss and Paris began fighting, China saw Moss give his gun to one of his friends. China was in the parking lot when Moss was shot, but she did not see Thomas at all. Taylor was inside the apartment when

Moss and Paris began fighting, and China never saw Taylor in the parking lot. China also did not see Taylor, Thomas, or Paris with guns that day. Moss was shot by one of his friends.

¶17 Brenda testified to the following. Before the shooting, Brenda was in the apartment when she saw Moss and his friends arrive with guns, at which point she ran out to the parking lot. Brenda saw Moss give his gun to his friends. After one of Moss's friends fired his gun, Taylor came out of the apartment with Brenda's "old double-barrel shotgun." The shotgun was an antique, it was not functional, and Brenda's family did not possess shells for it. After Taylor ran out of the apartment, Taylor was close to Brenda and he told her that she did not need to be out there. Taylor was not upset about having been punched in the face by Moss.

¶18 Thomas testified as follows. Thomas went out to the parking lot "[t]o stop a situation." Thomas was in the parking lot when Moss and his friends arrived. Thomas and Paris walked to Markeria's car and told Markeria to tell Moss to leave. Moss walked over to Paris and "started swinging." While Moss and Paris were fighting, Thomas heard a shot. Thomas then shot Moss, who Thomas believed was armed. After shooting Moss, Thomas ran from the area. Thomas did not see Taylor during the shooting because Thomas had already shot Moss and fled by the time Taylor arrived. Thomas was not aware that Taylor was armed. Brenda had a policy that any gun in the apartment could not be loaded.

On cross-examination, Thomas testified that he hid the other shotgun under the car “[t]o scare people off,” and that Paris did not help him do so.³

¶19 Taylor testified to the following. While he was using the bathroom, he heard one of his brothers say that there were guys in front of the apartment with guns. Taylor left the bathroom and saw guys with guns outside in the parking lot. Taylor then grabbed a shotgun “out of the corner of the [apartment]” and “rushed to protect” his brother, Paris, who was also in the parking lot. As Taylor ran to the parking lot, he heard a shot and identified one of Moss’s friends as the shooter. This person was shooting towards Taylor’s family members in the parking lot. When Taylor heard this shot, he rushed to protect his family. Once Taylor reached his family in the parking lot, he heard a second shot, at which point he “took cover.” Taylor then heard multiple shots and he “raised up” to see if his family was okay. Taylor did not see Thomas, nor did he see Moss get shot. After retreating from the area, Taylor then came back out into the parking lot to make sure that his family members got inside the apartment safely. After the shooting, Taylor told police that the shotgun that he possessed during the shooting was one that he had stolen. He told police this because he did not want his mother to get in trouble for keeping guns in the apartment. Taylor did not know whether the shotgun was loaded, but he thought he could protect his family in any event just by “[d]isplaying” it. Taylor did not point the shotgun at anyone during the fight.

¶20 In the State’s rebuttal case, the prosecutor called Fahrenbruch to testify again. The prosecutor played to the jury a video recording of an interview

³ Preston also testified, stating that Taylor was inside the apartment when the shooting started but ran out after it began, and that he did not see anyone with a gun during the shooting.

with Taylor that Fahrenbruch and another police officer conducted. The prosecutor did so in order to highlight statements that Taylor made during the interview about details that he did not testify to at trial, statements that were inconsistent with what the surveillance video showed. For example, Taylor told police during the interview that he dropped to the ground when the shots were fired; that he grabbed his mother, Brenda; that his family was outnumbered by Moss and his friends; that he never pointed the shotgun at anyone; and that he left the area of the shooting by getting a ride from a random stranger.

¶21 In closing arguments, the prosecutor made points that included the following: Taylor assisted Thomas by preventing Moss from escaping; Taylor pursued Moss even after Moss had been shot eight times and did not stop pursuing Moss until it would have been clear to Taylor that Moss was dying; and Taylor told Jones on the day before the shooting that Taylor was going to kill Moss for having punched Taylor in the face. The prosecutor also argued that Taylor was not acting in self-defense or defense of others. The prosecutor pointed to evidence that: Taylor told Jones that Taylor was going to kill Moss; Taylor continued to advance towards Moss after Moss had been shot eight times; Taylor waited outside the apartment with the shotgun before the fight broke out; once he learned that Moss was coming, Taylor did not call the police, nor did he leave with his family to a safe place; Taylor hid the shotgun in the bushes after the shooting; and Taylor “change[d] [his] story” regarding what happened.

¶22 In closing argument, Taylor’s counsel argued that Taylor could not have intended to assist his uncle, Thomas, in the shooting of Moss because Taylor did not know that Thomas was going to shoot Moss. Counsel also argued that once Taylor saw that Moss and his friends were armed, Taylor acted in defense of his family members.

¶23 The jury received an instruction for first-degree intentional homicide, as well as instructions for the lesser-included offenses of second-degree intentional homicide and first-degree reckless homicide, all as a party to the crime. Taylor’s counsel did not request that the jury receive an instruction for the lesser-included offense of second-degree reckless homicide. The written jury instructions included the full pattern jury instruction for defense of others. But when reading the jury instructions out loud to the jury, the circuit court inadvertently omitted the following sentence: “The State must prove by evidence which satisfies you beyond a reasonable doubt that the defendant did not act lawfully in defense of others.” Taylor’s counsel did not object to this omission.

¶24 The jury found Taylor guilty of first-degree reckless homicide with the use of a dangerous weapon as a party to the crime for aiding and abetting Thomas in killing Moss.

¶25 Taylor moved for postconviction relief. Specifically, he argued that there was insufficient evidence to support the jury’s verdict, that he received ineffective assistance of counsel in various respects, and that he was denied a fair trial when the circuit court omitted from the oral jury instructions a sentence regarding the burden of proof for defense of others. After a *Machner* hearing, the circuit court denied that motion.⁴ See *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979); see also *State v. Balliet*, 2011 WI 79, ¶31, 336 Wis. 2d 358, 805 N.W.2d 334 (explaining that a *Machner* hearing is “[t]he

⁴ In Taylor’s motion for postconviction relief, he also argued that he is entitled to 32 additional days of sentence credit. The State did not dispute this, and the circuit court granted that part of Taylor’s motion for postconviction relief.

evidentiary hearing to evaluate counsel’s effectiveness, which includes counsel’s testimony to explain his or her handling of the case”).

¶26 Taylor appeals.

DISCUSSION

¶27 On appeal, Taylor renews the arguments from his postconviction motion and also argues that we should grant him a new trial in the interests of justice. For the reasons explained, we reject each of these arguments.

I. Sufficiency of the Evidence

¶28 Taylor argues that there was insufficient evidence to support the verdict of first-degree reckless homicide as a party to the crime based on aiding and abetting Thomas in killing Moss. We disagree.

¶29 “It is the function of the trier of fact, and not of an appellate court, to fairly resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.” ***State v. Poellinger***, 153 Wis. 2d 493, 506, 451 N.W.2d 752 (1990). Consistent with this, when reviewing a challenge to the sufficiency of the evidence, we accord great deference to the factfinder. ***Id.*** at 506-07. We “may not substitute [our] judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt.” ***Id.*** at 507. “If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it.” ***Id.***; see also ***State v.***

Tarantino, 157 Wis. 2d 199, 218, 458 N.W.2d 582 (Ct. App. 1990) (We “will only substitute [our] judgment for that of the trier of fact when the fact finder relied upon evidence that was inherently or patently incredible—that kind of evidence [that] conflicts with the laws of nature or with fully-established or conceded facts.”). We independently review whether the evidence is sufficient to sustain a jury verdict. *State v. Hibbard*, 2022 WI App 53, ¶9, 404 Wis. 2d 668, 982 N.W.2d 105.

¶30 Here, Taylor was charged with and convicted of, as a party to the crime and with the use of a dangerous weapon, first-degree reckless homicide in violation of WIS. STAT. § 940.02(1) (2023-24), which makes it a felony to “cause[] the death of another human being under circumstances which show utter disregard for human life.”⁵ As the jury was instructed here, a conviction for first-degree reckless homicide requires findings that: (1) the death was caused by conduct that “created a risk of death or great bodily harm to another person”; (2) “the risk of death or great bodily harm was unreasonable and substantial”; and (3) “the defendant was aware that [the defendant’s] conduct created the unreasonable and substantial risk of death or great bodily harm.” WIS JI—CRIMINAL 1020.

¶31 The party to a crime statute, WIS. STAT. § 939.05, states that “[w]hoever is concerned in the commission of a crime is a principal and may be charged with and convicted of the commission of the crime although the person did not directly commit it.” § 939.05(1). Pertinent here, paragraph (2)(b) states that a person is “concerned in the commission of a crime” if the person “[i]ntentionally aids and abets the commission of it.” “The elements of aiding and

⁵ All references to the Wisconsin Statutes are to the 2023-24 version.

abetting are that a person: ‘(1) undertakes conduct ... which as a matter of objective fact aids another person in the execution of a crime, and further (2) [the person] consciously desires or intends that [the] conduct will yield such assistance.’” *Krueger v. State*, 84 Wis. 2d 272, 285, 267 N.W.2d 602 (1978) (quoting *State v. Manson*, 76 Wis. 2d 482, 486, 251 N.W.2d 788 (1977)). Consistent with this, the pattern jury instructions given here provide: “A person intentionally aids and abets the commission of a crime when, acting with knowledge or belief that another person is committing or intends to commit a crime, [the person] knowingly either... assists the person who commits the crime,” or “is ready and willing to assist and the person who commits the crime knows of the willingness to assist.” WIS JI—CRIMINAL 405. “To intentionally aid and abet [the crime], the defendant must know that another person is committing or intends to commit the crime ... and have the purpose to assist the commission of that crime.” WIS JI—CRIMINAL 405. “It is sufficient if the evidence demonstrates that the aider and abettor stood ready and willing to render aid if needed.” *Krueger*, 84 Wis. 2d at 286. Intent to aid and abet may be inferred from conduct. *State v. Marshall*, 92 Wis. 2d 101, 122-23, 284 N.W.2d 592 (1979).

¶32 Because Taylor was convicted of first-degree reckless homicide as a party to the crime on the basis that he aided and abetted Thomas, to support the conviction, the jury was required to make one of two findings. First, the jury could have found that Taylor assisted Thomas while knowing that Thomas intended to commit, or was committing, the crime of first-degree reckless homicide. Alternatively, the jury could have found that Taylor was ready and willing to assist Thomas, and that Thomas was aware that Taylor was ready and willing to assist him. Viewed in the light most favorable to the State, the evidence at trial was sufficient to prove, beyond a reasonable doubt, that Taylor

intentionally aided and abetted Thomas in the commission of first-degree reckless homicide.

¶33 The jury could reasonably have found all of the following facts. At the time of the shooting, Taylor and Thomas were both staying at Brenda's apartment, and as Jones testified, on the day before the shooting, Taylor told Jones that Taylor was going to kill Moss if he saw Moss. The parking lot surveillance video shows that Thomas and Paris hid one shotgun under a car in the parking lot after Moss arrived but before Paris and Moss began fighting. The video also shows that Taylor waited outside the apartment holding a different shotgun before Moss and Paris began fighting. And while Moss and Paris were fighting, Taylor ran towards Moss while holding the shotgun. Once Thomas began shooting, Taylor retreated a short distance, but he then, once again, advanced towards Moss and pointed the shotgun at Moss as Moss attempted to flee after having been shot eight times. The surveillance video contradicts much of the testimony of Taylor, Paris, and Taylor's other family members that was offered in support of Taylor's theory that he was acting in defense of his family. From the evidence presented, the jury could reasonably infer that Taylor was ready and willing to assist Thomas, and that Thomas was aware of Taylor's readiness and willingness to assist. As determined by the circuit court, the jury could also reasonably infer from this evidence that Taylor and several of his family members had a plan to ambush and kill Moss and that Taylor was an active participant in executing this plan.

¶34 In sum, we conclude that Taylor has failed to establish that there was insufficient evidence to support the jury's verdict. We reject Taylor's arguments to the contrary.

¶35 Taylor argues that there was no evidence of an overt action by Taylor that objectively aided or abetted Thomas. We disagree. As summarized above, Taylor took multiple actions that the jury could have determined assisted Thomas, such as running towards Moss with the shotgun. In addition, as an alternative to finding that Taylor knowingly assisted Thomas, the jury could have found that Taylor was ready and willing to assist Thomas and that Thomas knew of Taylor’s willingness to assist. *See* WIS JI—CRIMINAL 405.

¶36 Taylor also argues that because the jury did not find Taylor guilty of first- or second-degree *intentional* homicide as a party to the crime but instead found him guilty of first-degree reckless homicide, “the jury did not find that Taylor had any intent to cause [Moss’s] death,” and as a result, Taylor argues, “no factual nexus ties Taylor to [Thomas’s] actions.” We reject this argument. “Intent for purposes of establishing liability as an aider and abettor is evidenced by knowledge or belief that a person is committing or intends to commit a criminal act[.]” ***State v. Ivy***, 119 Wis. 2d 591, 606, 350 N.W.2d 622 (1984). Here, the evidence was sufficient to support a finding that Taylor knew that Thomas intended to commit or was committing the crime of first-degree reckless homicide. To the extent that Taylor means to argue that one cannot intentionally aid and abet the commission of a reckless crime, we reject that argument as unsupported by legal authority and as contrary to case law. *See Hibbard*, 404 Wis. 2d 668, ¶9 (rejecting a sufficiency of the evidence challenge to a first-degree reckless homicide conviction based on a theory of aiding abetting); ***State v. Pettit***, 171

Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (“Arguments unsupported by references to legal authority will not be considered.”).⁶

II. Ineffective Assistance of Counsel

¶37 Taylor argues that his trial counsel was ineffective in various respects. “The Sixth Amendment of the United States Constitution guarantees the effective assistance of counsel to every criminal defendant.” **State v. Mull**, 2023 WI 26, ¶34, 406 Wis. 2d 491, 987 N.W.2d 707. A defendant is denied that right when the defendant’s counsel performs deficiently and the deficiency prejudices the defendant. **Id.** The burden is on the defendant to prove both prongs. **State v. Moats**, 156 Wis. 2d 74, 100, 457 N.W.2d 299 (1990). “If the defendant fails to make a sufficient showing on one prong, it is unnecessary to address the other.” **State v. Bucki**, 2020 WI App 43, ¶81, 393 Wis. 2d 434, 947 N.W.2d 152.

¶38 Counsel performs deficiently when counsel’s conduct falls outside the wide range of objectively reasonable conduct. **Mull**, 406 Wis. 2d 491, ¶35. “We apply a ‘strong presumption’ that counsel acts ‘reasonably within professional norms.’” **Id.** (quoting **State v. Coleman**, 2015 WI App 38, ¶20, 362 Wis. 2d 447, 865 N.W.2d 190). When counsel’s decisions are objectively reasonable, we are “‘highly deferential’” to those decisions. **Id.** (quoting **State v. Breitman**, 2017 WI 100, ¶65, 378 Wis. 2d 431, 904 N.W.2d 93). We do not review the reasonableness of trial counsel’s decisions with the benefit of hindsight; instead, “we examine trial counsel’s choices ‘in the context of the

⁶ Taylor also asserts that the circuit court erred in making what Taylor refers to as findings in denying his motion for postconviction relief. However, he also acknowledges that our review is de novo. Given the standard of review, and because we do not rely on these same “findings,” we do not further discuss these assertions.

circumstances as they existed at the time he made his decisions.” *Id.*, ¶¶35-36 (quoted sources omitted).

¶39 “To establish prejudice ‘[t]he defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *State v. Domke*, 2011 WI 95, ¶54, 337 Wis. 2d 268, 805 N.W.2d 364 (alteration in original) (quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984)).

¶40 Whether a defendant received ineffective assistance of counsel is a mixed question of fact and law. “The factual circumstances of the case and trial counsel’s conduct and strategy are findings of fact, which will not be overturned unless clearly erroneous; whether counsel’s conduct constitutes ineffective assistance is a question of law, which we review de novo.” *Breitzman*, 378 Wis. 2d 431, ¶37.

¶41 Taylor argues that each of the following constitutes deficient performance that prejudiced his defense: (1) counsel’s failure to introduce evidence regarding Taylor’s subjective belief in advance of the shooting about Moss’s alleged propensity for violence; (2) counsel’s failure to object to the circuit court’s inadvertent omission from the oral jury instructions a sentence regarding the burden of proof for defense of others; (3) counsel’s failure to request an instruction on second-degree reckless homicide as a lesser-included offense; and (4) counsel’s failure to argue a theory of self-defense to the jury during closing arguments. Regarding each of these, we conclude either that counsel did not perform deficiently or that, even if he did, no prejudice resulted. Accordingly, we reject Taylor’s argument that he received ineffective assistance of counsel.

*A. Counsel's failure to seek admission of alleged **McMorris** evidence*

¶42 Taylor argues that counsel performed deficiently by failing to introduce evidence regarding Taylor's subjective belief in advance of the shooting about Moss's alleged propensity for violence. We conclude that counsel did not perform deficiently with regard to some of this evidence. And regarding the remaining evidence, we conclude that even if we assume without deciding that counsel performed deficiently, Taylor was not prejudiced by counsel's failure to seek to admit the evidence because the evidence would not create a reasonable probability of a different outcome.

¶43 Evidence regarding a victim's specific prior acts of violence, when known to the defendant and when self-defense is asserted, may be admitted, in the discretion of the circuit court, under precedent that includes **McMorris v. State**, 58 Wis. 2d 144, 205 N.W.2d 559 (1973). As this court has explained:

[W]hen self-defense is raised as an issue, and if there is a factual basis to support a self-defense claim, the defendant may, in support of the defense, establish what the defendant believed to be the victim's violent character by proving prior specific instances of violence within his knowledge at the time of the incident....

... [W]ithin the trial court's discretion, the defendant should be allowed to produce supporting evidence to prove that the particular acts of which the defendant claims knowledge actually occurred, "thereby proving the reasonableness of the accused's knowledge and apprehension of the victim and the credibility of his assertions about his state of mind."

State v. Wenger, 225 Wis. 2d 495, 507-08, 593 N.W.2d 467 (Ct. App. 1999) (citations omitted).

¶44 We observe that Taylor’s argument ignores the fact that the parties agreed before trial that certain evidence of Moss’s prior violent acts would be admissible. Specifically, the parties agreed that evidence could be admitted showing that Moss had come to Brenda’s apartment a day or two before the shooting and punched Taylor in the face, knocking him unconscious. The parties also agreed that evidence could be admitted showing that Moss had hit Markeria earlier on the day of the shooting. Consistent with the parties’ agreements, that evidence was presented to the jury at trial through the testimony of Taylor and Markeria. Markeria also testified to Moss’s acts of violence beyond what took place on the day of the shooting. Specifically, in describing her relationship with Moss, she testified that he had hit her in the past and she described an earlier occasion on which he had threatened her.⁷

¶45 In light of this evidence presented regarding Moss’s alleged prior acts of violence, Taylor’s argument is actually that counsel was ineffective for failing to present *additional* evidence regarding Moss’s prior acts of violence. That evidence appears to consist of the following: evidence showing that Moss believed that Taylor had Moss’s gun, which was the reason that Moss punched Taylor a day or two before the shooting and then returned on the day of the shooting; evidence that Moss and his friends had come to the apartment and drew or displayed guns during interactions with Taylor and his family in the days preceding the shooting; and evidence that Moss generally had a reputation for violence. We address each of these contentions in turn.

⁷ We observe that, as previously noted, Markeria also testified that she had not told Taylor, his siblings, or his mother about Moss hitting and threatening her, which would appear to undermine the relevance of this evidence for purposes of showing Taylor’s state of mind.

¶46 First, Taylor argues that counsel was deficient for failing to seek to introduce evidence that the reason Moss punched Taylor a day or two before the shooting and came to the apartment on the day of the shooting was because Moss believed that Taylor had Moss’s gun, which Moss wanted back. Specifically, in an interview, Markeria told police the following. After she and Moss had a disagreement, Moss asked to retrieve personal belongings from her apartment. Because Moss was “upset” and “hostile,” she did not let him in and called her brother. Her brother arrived with several other people and her brother took a gun from her apartment that belonged to Moss. Taylor wound up possessing Moss’s gun. Markeria asked Taylor to give Moss the gun back, but Taylor refused to do so and said that Moss was going to have to fight him. Taylor argues that counsel was deficient for not seeking to admit this “contextual evidence regarding the nature of the dispute between [Taylor’s] family and [Moss].”

¶47 Taylor fails to explain how this is **McMorris** evidence. Although it could arguably be evidence of Moss’s motive regarding his interactions with Taylor and Taylor’s family or of the context in which the dispute arose, Taylor does not explain how it could be relied on as evidence of Moss’s “violent character” or “prior specific instances of violence” previously known to Taylor. See **Wenger**, 225 Wis. 2d at 507. Further, Taylor does not offer a developed argument outside of the **McMorris** context as to how this evidence would have been admissible, much less why it was deficient performance to not seek its admission.

¶48 Further, even putting that shortcoming to the side, Taylor’s argument also fails to acknowledge that the jury did in fact hear evidence regarding Moss’s allegedly violent conduct of which Taylor would have been aware. Specifically, Markeria testified that Taylor “was saying that he had something of [Moss’s] and

because [Moss] knocked him out, that [Moss] was going to have to come and fight [Taylor].” The jury was thus aware of the allegation of a conflict between Moss and Taylor, resulting in violence by Moss, arising out of Taylor’s possession of something that belonged to Moss. Although the jury did not know that the specific object that Moss believed that Taylor had and that Moss wanted back was a gun, Taylor does not develop an argument as to why that particular detail would be admissible under *McMorris* to show Taylor’s knowledge of Moss’s violent character.⁸ And in any event, we conclude that keeping that particular detail from the jury was an objectively reasonable decision. Counsel could have reasonably determined that it was preferable to keep from the jury the allegation that Taylor took a gun from Moss without his permission and refused to return it to Moss, which in itself could be viewed as criminal and potentially dangerous behavior.

¶49 Second, Taylor argues that counsel performed deficiently by failing to seek to introduce evidence that Moss and his friends, in the days leading up to the shooting, went to the apartment and drew or displayed guns during interactions in the parking lot with Taylor and his family. Relevant to this argument is the following potential evidence that was not introduced at trial. Taylor told police in an interview that Moss and his friends “pulled a gun on” one of Taylor’s brothers in the days before the shooting. Consistent with this, Paris told police that, in the days leading up to the shooting, Moss and two others pulled into the apartment building’s parking lot in a car, that Moss told Paris, “Tell them we out here,” and that Moss had a gun hanging out the window that Moss pointed at Paris. Taylor

⁸ China testified that Moss came to the apartment building on the day of the shooting to get a gun, but the State objected and moved to strike that testimony, and the circuit court sustained the objection and the testimony was ordered stricken.

also told police that, when Moss punched Taylor in the face in the days leading up to the shooting, Moss's friends had their guns drawn.⁹

¶50 In rejecting Taylor's argument regarding this evidence, we first observe that the argument is largely undeveloped on appeal. Taylor does not argue that counsel should have sought to admit this evidence under **McMorris** to show that Taylor believed that Moss, as opposed to others, was armed on the day of the shooting. Consistent with this, at trial, Taylor did not testify that he believed that Moss was armed. Instead, Taylor testified that he grabbed the shotgun to keep one of Moss's friends (the friend who fired a gun during the shooting) from harming Taylor's family.¹⁰ And otherwise, Taylor does not develop an argument that evidence of Moss's friends' earlier actions, or a belief that Moss's friends were armed, would be admissible under **McMorris**, nor does he cite any legal authority that extends **McMorris** to the actions of anyone other than the victim. Taylor's argument is thus undeveloped, and we could reject it for that reason. See **Pettit**, 171 Wis. 2d at 646 (explaining that this court need not consider arguments that are unsupported by legal authority or are otherwise undeveloped). Further, even if we assume without deciding that counsel's

⁹ Taylor may also mean to argue that counsel was ineffective for failing to seek to introduce additional evidence under **McMorris v. State**, 58 Wis. 2d 144, 205 N.W.2d 559 (1973)—specifically, video surveillance that showed Moss with another individual who was carrying a gun in the parking lot of the apartment building at some point in the days leading up to the shooting, and Taylor appears to argue that counsel should have sought to admit either the video or still shots from the video. However, Taylor does not explain whether this video is one of either of the occasions discussed above (when Moss pointed a gun at Paris or when Moss punched Taylor in the face). To the extent this video is of a separate incident, Taylor does not argue that it was an incident that he had knowledge of such that the evidence would be admissible under **McMorris**.

¹⁰ Similarly, when asked on re-cross-examination about Taylor having seen from the apartment that Moss and his friends were armed, Taylor specified that it was one of Moss's friends who he saw with a gun (again, the same friend who fired a gun during the shooting).

performance was deficient, we conclude that Taylor fails to establish any resulting prejudice because it was undisputed at trial that at least one of Moss’s friends was armed when Moss and his friends arrived at the apartment on the day of the shooting, and that Taylor knew that Moss’s friend was armed. Because this was undisputed, we conclude that the evidence supporting a finding that Moss and his friends had drawn guns during the earlier interactions with Taylor and his family would not create a reasonable probability of a different outcome. Accordingly, Taylor fails to show prejudice.

¶51 Third, Taylor argues that counsel performed deficiently by failing to seek to introduce evidence that Moss and his friends generally had a reputation for violence. Relevant to this argument, Taylor told police in an interview the following:

And like I said [Moss and his friends] got into it [with] one guy in [another apartment building], which started that shooting. And somebody in [that other apartment building] I heard got hit[,] due to them same little youngsters. [Moss] was one of the many youngsters that was in there, [that] I was hearing about. They had robbed some guy. Tried to rob him for his weed or something like that....

In a similar vein, Brenda told police that one of her sons was told that Moss and his friends “rob folks and do all that other stuff.” Even if we assume that counsel performed deficiently by failing to seek to admit this evidence, and further assume that the circuit court would have admitted this evidence, Taylor has failed to show prejudice. Given the evidence that was presented to the jury regarding Moss’s previous acts of violence—specifically, that he had punched Taylor in the face in the days leading up to the shooting and that he had hit Markeria—this evidence concerning Moss’s general reputation for violence was cumulative and of limited probative value. See *State v. Jackson*, 2014 WI 4, ¶¶88-91, 352 Wis. 2d 249, 841

N.W.2d 791 (concluding that excluding the victim’s reputation for violence was harmless error because it was of “modest probative value” and “paled in comparison” to the “substantial body of evidence” showing that the victim was violent) (quoted source omitted); **Wenger**, 225 Wis. 2d at 510 (concluding that when evidence had already been introduced to establish the defendant’s state of mind and the reasonableness of his actions in support of his self-defense claim, there was not a reasonable probability that the exclusion of cumulative evidence contributed to the defendant’s conviction). Accordingly, we conclude that this evidence would not create a reasonable probability of a different outcome and that Taylor therefore fails to show prejudice.

B. Failure to object to oral jury instructions

¶52 As noted, the circuit court at trial, when reading the jury instructions regarding defense of others, omitted language regarding the burden of proof. Specifically, the transcript reflects that the court did not read out loud the following sentence from the written jury instructions: “The State must prove by evidence which satisfies you beyond a reasonable doubt that the defendant did not act lawfully in defense of others.” Taylor argues that counsel was constitutionally ineffective by failing to object to this omission. We reject this argument.

¶53 “[J]ury instructions that have the effect of relieving the State of its burden of proving beyond a reasonable doubt every element of the offense charged are unconstitutional under the Fifth and Sixth Amendments.” **State v. Harvey**, 2002 WI 93, ¶23, 254 Wis. 2d 442, 647 N.W.2d 189. “In reviewing challenges to jury instructions, we do not view a single instruction to a jury in artificial isolation.” **State v. Zelenka**, 130 Wis. 2d 34, 49, 387 N.W.2d 55 (1986). Instead, we “review the jury instructions as a whole to determine whether they fully and

fairly convey the applicable rules of law to the jury.” *Dakter v. Cavallino*, 2015 WI 67, ¶87, 363 Wis. 2d 738, 866 N.W.2d 656. Failing to object to a jury instruction that fully and fairly conveys the relevant law is not deficient performance and does not result in prejudice. *State v. Langlois*, 2018 WI 73, ¶50, 382 Wis. 2d 414, 913 N.W.2d 812.

¶54 As stated, the circuit court omitted the following language from the oral instructions: “The State must prove by evidence which satisfies you beyond a reasonable doubt that the defendant did not act lawfully in defense of others.” We conclude that the jury instructions, viewed as a whole, nevertheless fully and fairly conveyed that it was the State’s burden to prove beyond a reasonable doubt that Taylor was not acting in defense of others. As a result, Taylor fails to show that counsel’s failure to object was deficient or resulted in prejudice.

¶55 First, the language that was omitted from the oral instructions was included in the written jury instructions that were provided to the jury to use during their deliberations. In addition, the circuit court explicitly encouraged the jury to use the written instructions if needed. Before reading the oral jury instructions, the court said to the jury:

I’m going to read you a lot of instructions right now about the various elements and potential lesser-included offenses. It is quite complex, and I just want you to listen as carefully as possible. But I will also tell you that you will have a full written packet of these instructions when you go back to the jury room so you can review them as you go through your deliberations. Okay? So don’t get overwhelmed.

¶56 Second, it was stated at multiple other points in both the written and oral instructions that the burden was on the State to prove that Taylor was not

acting in defense of others. For example, directly after what would have been the omitted sentence, the circuit court said:

If you are satisfied beyond a reasonable doubt that all elements of first-degree intentional homicide as a party to a crime or second-degree intentional homicide as a party to a crime or first-degree reckless homicide as a party to a crime have been proved *and the defendant did not act lawfully in the defense of others*, you should find the defendant guilty. If you are not so satisfied, you must find the defendant not guilty.

(Emphasis added.) The court also orally instructed the jury, and the written instructions stated, as a general matter: “The burden of establishing every fact necessary to constitute guilt is upon the State. Before you can return a verdict of guilty, the evidence must satisfy you beyond a reasonable doubt that the defendant is guilty.” Read together, these instructions convey that the burden was on the State to prove beyond a reasonable doubt that Taylor was not acting in defense of others.

¶57 That it was the State’s burden to prove that Taylor did not act in defense of others was also explicitly stated in the oral instruction for first- and second-degree intentional homicide: As to first-degree intentional homicide, the circuit court instructed the jury:

Before you may find the defendant guilty of first-degree intentional homicide as a party to a crime, the State must prove by evidence which satisfies you beyond a reasonable doubt that ... the defendant did not actually believe that the force used was necessary to prevent imminent death or great bodily harm to himself or others.

Regarding second-degree intentional homicide, the court instructed:

Before you may find the defendant guilty of [second-degree intentional homicide], the State must prove by evidence which satisfies you beyond a reasonable doubt that ... the

defendant did not reasonably believe that he was preventing or terminating an unlawful interference with his person or did not reasonably believe that the force used was necessary to prevent imminent death or great bodily harm to himself and/or others.

¶58 Regarding the instruction for first-degree reckless homicide, the circuit court’s oral instructions did not specifically say that it was the State’s burden to prove beyond a reasonable doubt that Taylor did not act in defense of others, but this idea was conveyed regarding self-defense:

Before you may find the defendant guilty of first-degree reckless homicide as a party to a crime, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

... [L]astly, that the defendant was aware that his conduct created the unreasonable and substantial risk of death or great bodily harm.

You should consider the evidence relating to self-defense in deciding whether the defendant’s conduct created an unreasonable risk to another. If the defendant was acting lawfully in self-defense, his 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 of the evidence in the case that the risk was unreasonable.

(Emphasis added.) Similarly, the court orally instructed the jury as follows regarding self-defense:

Because the law provides that it is the State’s burden to prove all the facts necessary to constitute a crime beyond a reasonable doubt, you will not be asked to make a separate finding on whether the defendant acted in self-defense. Instead, you will be asked to determine whether the State has established the necessary facts to justify a finding of guilty for first- or second-degree intentional homicide or for first-degree reckless homicide. If the State does not satisfy you that those facts are established by the

evidence, you will be instructed to find the defendant not guilty.

¶59 The circuit court also orally instructed the jury, as a general matter, of the following:

Defendants are not required to prove their innocence. The law presumes every person charged with the commission of an offense to be innocent. This presumption requires a finding of not guilty unless in your deliberations you find it is overcome by evidence which satisfies you beyond a reasonable doubt that the defendant is guilty.

The burden of establishing every fact necessary to constitute guilt is upon the State. Before you can return a verdict of guilty, the evidence must satisfy you beyond a reasonable doubt that the defendant is guilty.

¶60 In sum on this issue, even taking into account the sentence that was orally omitted, when we review the jury instructions as a whole, as provided orally and in written form, we conclude that they fully and fairly conveyed the applicable rules of law to the jury. See *Langlois*, 382 Wis. 2d 414, ¶47 (“[A]lthough the State’s burden might be less clear if the challenged self-defense instruction is read in isolation, the context provided by the prior instruction and the general instructions clearly convey that the State bore the burden to disprove self-defense. Thus, the jury instruction ... is not erroneous because, viewed in context, it communicates a correct statement of law.”). Because the jury instructions as a whole accurately stated the law, counsel did not perform deficiently by failing to object to the omission, and counsel’s failure to object was not prejudicial. We reject Taylor’s argument to the contrary.

¶61 Taylor argues that the omission “impermissibly shifted the burden from the State onto Taylor.” We disagree. As stated, the jury instructions made it clear that it was the State’s burden to prove beyond a reasonable doubt that Taylor

did not act in defense of others. The mere omission of the sentence at issue from the oral portion of the one instruction does nothing to contradict those correct statements of the law, which are reflected in the written instructions that the jury was encouraged to consult.¹¹

C. Failure to request lesser-included offense

¶62 Taylor argues that counsel performed deficiently by failing to request an instruction on second-degree reckless homicide as a lesser-included offense. We conclude that counsel did not perform deficiently by failing to request this instruction because the evidence did not reasonably support acquittal on the greater charge and conviction on the lesser charge.

¶63 “[A] lesser-included offense instruction should be provided if ‘a jury giving the evidence full credence could reasonably return a verdict of guilt on the lesser-included offense.’” *State v. Johnson*, 2021 WI 61, ¶18, 397 Wis. 2d 633, 961 N.W.2d 18 (quoting *Ross v. State*, 61 Wis. 2d 160, 211 N.W.2d 827 (1973)). “[T]he decision of whether to request a lesser-included offense instruction is a complicated one involving legal expertise and trial strategy.” *State v. Eckert*, 203 Wis. 2d 497, 509, 553 N.W.2d 539 (Ct. App. 1996). Counsel is not deficient for failing to request an instruction on a lesser-included offense when the evidence does not reasonably support acquittal on the greater charge and conviction on the

¹¹ Taylor separately argues, outside of the ineffective assistance of counsel framework, that he is entitled to a new trial because the omission denied him a fair trial by shifting the burden of proof. Although Taylor acknowledges that he forfeited this argument by failing to raise it in the circuit court, he nonetheless asserts that we should address this argument outside of the framework for ineffective assistance of counsel. Even if we were to overlook forfeiture, Taylor’s argument would fail given our conclusion here that the jury instructions fully and fairly conveyed the applicable rules of law to the jury.

lesser charge. *State v. Miller*, 2009 WI App 111, ¶46, 320 Wis. 2d 724, 772 N.W.2d 188.

¶64 Here, Taylor was found guilty of first-degree reckless homicide as a party to the crime on the basis that he aided and abetted Thomas in the commission of first-degree reckless homicide. Taylor argues that counsel was deficient for failing to request an instruction for second-degree reckless homicide as a party to the crime. A person is guilty of first-degree reckless homicide when the person “recklessly causes the death of another human being under circumstances which show utter disregard for human life.” WIS. STAT. § 940.02(1). A person is guilty of second-degree reckless homicide when the person “recklessly causes the death of another human being.” WIS. STAT. § 940.06(1). The difference, then, is that “utter disregard for human life” is an element of first-degree reckless homicide but not of second-degree reckless homicide. *Johnson*, 397 Wis. 2d 633, ¶28. “A person acting with utter disregard must possess a state of mind which has no regard for the moral or social duties of a human being.” *Id.*, ¶29 (internal quotation marks and quoted source omitted).

¶65 Taylor argues that counsel was deficient for not seeking an instruction on second-degree reckless homicide because Taylor’s conduct did not show an utter disregard for human life. Specifically, Taylor argues that his “only involvement” in the shooting was to “stand[] by, armed with a shotgun,” and that “Taylor never discharged his weapon.”

¶66 To start, Taylor’s argument mischaracterizes the evidence because the jury had a strong basis to find that he did not merely “stand by.” The video reflects that, when Moss and Paris began fighting, Taylor rushed towards Moss

holding the shotgun. Further, after Moss was shot, Taylor again advanced towards Moss and pointed the shotgun at Moss as Moss tried to escape.

¶67 Moreover, Taylor’s argument overlooks that, because he was charged as a party to the crime for having aided and abetted Thomas, it is not only Taylor’s conduct that is at issue in determining whether counsel should have sought an instruction on second-degree reckless homicide. As discussed above when addressing Taylor’s sufficiency of the evidence challenge, “[t]o intentionally aid and abet [the crime], the defendant must know that another person is committing or intends to commit the crime ... and have the purpose to assist the commission of that crime.” See WIS JI—CRIMINAL 405. Taylor does not argue that the jury could have reasonably found that Thomas’s conduct—shooting Moss eight times—did not evince an “utter disregard for human life” such that counsel should have sought an instruction on second-degree reckless homicide. We conclude that the jury could not have reasonably found that Thomas’s conduct did not show an “utter disregard for human life.” Further, as we have already explained, there was sufficient evidence for the jury to find that Taylor aided and abetted Thomas. Accordingly, we reject Taylor’s argument that counsel was deficient for not seeking an instruction on second-degree reckless homicide.¹²

¹² Taylor argues that “[b]ecause the lesser-included offense factually and legally fits the facts of this case, trial counsel had a duty to discuss the issue with Taylor.” Because we conclude that the evidence did not reasonably support acquittal on the first-degree reckless homicide charge and conviction on the second-degree reckless homicide charge—or, using Taylor’s words, that the lesser-included offense here did not “factually and legally fit[] the facts of this case”—we reject Taylor’s argument that counsel had a duty to discuss it with Taylor.

D. Counsel's remarks regarding self-defense during closing

¶68 Taylor argues that counsel performed deficiently by not arguing self-defense to the jury. Specifically, Taylor points to the following remarks by counsel during closing argument:

[Taylor] wasn't out there holding a gun until he identified somebody that he tied to Mr. Moss as being armed with a handgun at the dumpsters. That's extremely important here. If I don't have that fact, I don't have the defense of others. I don't even have self-defense.

And if you're going to push my theory on the case, I have to say it's defense of others. It's not defense of himself because he goes out there willingly. Nobody came to his apartment and tried to say get out of the apartment or I'm going to blow your butt off. That doesn't happen. That would be self-defense. That's not what we have here. What we have here is a defense of others.

You heard that the defendant lives with his mother and his sisters and his brothers, and he has lived in the area for about 16 years and the bottom line to all of this was if you take a look at the context of the case, he was defending his family.

We conclude that counsel did not perform deficiently in making these remarks, because counsel's decision to rely on defense of others rather than self-defense was a reasonable choice.

¶69 The remarks quoted above are consistent with what counsel said elsewhere in closing:

I want you to understand what our argument is. We are basically saying based on the circumstances that my client faced on September 28th, he was acting because he believed there to be an imminent threat of either great bodily harm or death to his family members. And let me be very clear here. He thought that because he saw Mr. Moss with his friends armed in the parking lot.

This theory of the case was a reasonable one. First, it is consistent with Taylor’s testimony at trial. Taylor testified multiple times that the actions he took were to protect his family. In contrast, Taylor did not testify that he acted in self-defense. Second, the decision to rely on defense of others was a reasonable decision given that some of Taylor’s actions, as captured on the surveillance video, were inconsistent with a theory of self-defense. Specifically, the video showed Taylor running towards the fight while carrying the shotgun. The video also showed Taylor—after Moss had been shot and after Taylor had retreated several steps—advancing back towards Moss and pointing the gun at Moss as Moss attempted to flee. And, as counsel explained in closing, even Taylor’s version of events was inconsistent with a theory of self-defense in that Taylor placed himself in danger by grabbing the shotgun and running towards the fight in the parking lot. Given the evidence introduced at trial, counsel’s decision to rely on a theory of defense of others rather than self-defense was an objectively reasonable decision, and thus does not constitute deficient performance.

¶70 Taylor argues that because counsel testified at the *Machner* hearing that counsel did not intend to concede that Taylor had not proven self-defense, counsel’s statement at closing “was not a valid strategic decision.” However, “[a] reviewing court can determine that defense counsel’s performance was objectively reasonable, even if trial counsel offers no sound strategic reasons for decisions made.” *State v. Honig*, 2016 WI App 10, ¶24, 366 Wis. 2d 681, 874 N.W.2d 589 (2015).

¶71 Taylor also argues that counsel decided to rely on a theory of defense of others rather than self-defense without Taylor’s consent or permission, which Taylor argues contravenes *McCoy v. Louisiana*, 584 U.S. 414 (2018). In *McCoy*, which we observe was not addressing a claim of ineffective assistance of

counsel, *id.* at 427, the Supreme Court concluded that “counsel’s admission of a client’s guilt over the client’s express objection” is structural error requiring reversal, *id.* However, as the State argues and the circuit court reasoned, *McCoy* is distinguishable. In *McCoy*, the State charged McCoy with three counts of first-degree murder and sought the death penalty. *Id.* at 418. McCoy’s counsel determined that the evidence against McCoy was overwhelming and “absent a concession at the guilt stage that McCoy was the killer, a death sentence would be impossible to avoid at the penalty phase.” *Id.* Consistent with this determination, and over McCoy’s objection, counsel conceded McCoy’s guilt. *Id.* at 419-20. Here, in contrast, counsel did not concede that Taylor was guilty of any crime. Instead, counsel relied on a theory of defense of others, which would have resulted in acquittal if successful, instead of relying on self-defense, which, as we have explained, was not supported by the evidence. Because *McCoy* is distinguishable, we reject Taylor’s reliance on that case.

III. Interests of Justice

¶72 Taylor argues that we should exercise our discretion and reverse and grant him a new trial in the interests of justice pursuant to WIS. STAT. § 752.35. That statute provides in relevant part: “In an appeal to the court of appeals, if it appears from the record ... that it is probable that justice has for any reason miscarried, the court may reverse the judgment or order appealed from[.]” § 752.35. In arguing for discretionary reversal, Taylor relies on the arguments that we have addressed above, which he argues cumulatively “resulted in a trial that violates due process.” Having rejected each of Taylor’s individual arguments, we must reject his argument that, taken together, these arguments justify discretionary reversal.

CONCLUSION

¶73 For the reasons stated, we affirm.

By the Court.—Judgment and order affirmed.

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

