**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**December 7, 2016**

**Diane M. Fremgen**
**Clerk of Court of Appeals**



**Appeal No. 2015AP922** **Cir. Ct. No. 2006CF594**

**STATE OF WISCONSIN** **IN COURT OF APPEALS**
**DISTRICT II**

**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**TERRY S. SHANNON,**

**DEFENDANT-APPELLANT.**

APPEAL from an order of the circuit court for Racine County: FAYE M. FLANCHER, Judge. *Affirmed*.

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

¶1 REILLY, P.J. Terry S. Shannon was convicted by a jury in 2009 of first-degree intentional homicide and discharging a firearm from a vehicle, both as

party to a crime, and sentenced to life in prison. We affirmed on Shannon's direct appeal.[1] Shannon seeks to have his conviction declared "unlawful" on grounds that the jury did not consider the affirmative defense of unnecessary defensive force (imperfect self-defense) under WIS. STAT. § 940.01(2)(b) (2013-14).[2] Shannon, with advice of counsel, made a reasonable strategic decision to go "all-or-nothing" on first-degree intentional homicide with an assertion of perfect self-defense, and the court correctly instructed the jury on WIS JI—CRIMINAL 805. Shannon's trial and postconviction counsel were not deficient. We affirm.

## FACTS

¶2 At 3:23 a.m. on May 7, 2006, a car driven by Shannon, with his brother Antonio Shannon (Tony) occupying the front passenger seat, drove up to a car parked on College Avenue in the City of Racine. Almost simultaneously with Shannon pulling up to the parked car, a gun battle erupted. In the parked car was Bennie Smith (driver's seat), Courtney Taylor, Calvin Miller, and Kinte Scott. Smith's car was parked outside of Taylor's home. Shannon and his brother are members of the Gangster Disciples gang. Smith and Scott are Vice Lords. Approximately an hour earlier, Smith and Shannon had a heated, unfriendly argument at a local restaurant; Smith wanted to fight Shannon and Shannon acted as if he had a gun in his waist. Shannon left and got his brother, Tony. Smith and his companions went to Taylor's home to meet with some girls.

[1] ***State v. Shannon***, No. 2011AP1825-CR, unpublished slip op. ¶¶1-4 (WI App Dec. 5, 2012). See also Shannon's brother, Antonio Shannon's, companion case, ***State v. Shannon***, No. 2013AP130-CR, unpublished slip op. ¶¶1-3 (WI App Nov. 13, 2013).

[2] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

¶3 Taylor testified at trial that when he saw the Shannons turn onto College Avenue he pulled his gun: "I knew it was gonna be something. It's late at night, this is my house, like ain't nobody coming to talk or do nothing. Like we tried talking before." Taylor told Smith, who was in the driver's seat, to get down. Taylor testified that he was ready with his 9-millimeter gun when the Shannon vehicle pulled alongside. Taylor testified that Tony shot first and that he then returned fire.

¶4 Expert testimony established that at least three guns were involved and at least twenty-six shots were fired from both inside and outside of Smith's vehicle. All four people in the Smith vehicle were hit by gunfire. Smith himself had eight gunshot wounds, including one fatal shot to the brain. The Shannons sped away unscathed, and a short time later were observed torching their vehicle. The Shannons did not testify at trial.

## BACKGROUND

¶5 On the eve of a scheduled jury trial in 2007, the Shannon brothers accepted an offer from the State and pled guilty to second-degree reckless homicide. In preparation for the 2007 jury trial, neither brother asserted the affirmative defense of unnecessary defensive force (imperfect self-defense), which would have made second-degree intentional homicide a lesser-included crime. Prior to sentencing on the charge of second-degree reckless homicide, both brothers claimed their counsel was ineffective and both sought plea withdrawal. The State did not object and the court allowed the pleas to be withdrawn.

¶6 The Shannons, in consult with their new attorneys, decided to go to trial on the charge of first-degree intentional homicide. The brothers' primary strategy was that they did not cause Smith's death (the first element of first-degree

intentional homicide), claiming that Smith was fatally shot by someone in his own vehicle. The Shannons' secondary strategy was that they were acting in self-defense. Both brothers, in consult with their counsel, informed the court at the jury instruction conference that they were choosing to not ask for a lesser-included crime on the verdict. Defense counsel told the court that they had explained the pros and cons of not asking for the lesser-included crime of second-degree intentional homicide with their clients. Counsel for both brothers requested WIS JI—CRIMINAL 805, which is the jury instruction utilized when the affirmative defense of perfect self-defense is asserted to a charge of first-degree intentional homicide.

¶7 In 2014, Shannon filed this WIS. STAT. § 974.06 motion, arguing that the trial court erred by failing to give an unrequested jury instruction on the lesser-included offense of second-degree intentional homicide. Shannon claims his trial counsel was ineffective for not requesting the correct jury instruction and his appellate counsel was ineffective for not raising ineffective assistance of trial counsel.

¶8 At the ***Machner***[3] hearing, Shannon testified that his trial counsel advised him to not ask for the lesser-included crime of second-degree intentional homicide and to go with an "all-or-nothing" defense and he agreed to that advice. Trial counsel testified that it was a strategic decision to not request the lesser-included because he did not want evidence of prior shootings between the parties revealed to the jury which would make the Shannons' actions appear to be revenge shootings. Trial counsel also testified that the best outcome with an imperfect

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

self-defense assertion would be a conviction for second-degree intentional homicide, which would be a "ridiculous strategy" given that Shannon had withdrawn his plea to second-degree reckless homicide.[4]

¶9 The trial court found that Shannon's trial and postconviction counsel were not deficient as it was clear after the brothers withdrew their pleas to second-degree reckless homicide that it was an "all-or-nothing" case. The court found that trial counsel had discussed the decision to not request the lesser-included offense of second-degree intentional homicide with Shannon and that trial counsel had done "his due diligence on this case." The court found trial counsel's strategy to be reasonable.

*Standard of Review*

¶10 Shannon claims that the jury was not properly instructed. We will not reverse a trial court's instruction unless we conclude that the instruction did not accurately reflect the applicable law. ***State v. Elverman***, 2015 WI App 91, ¶40, 366 Wis. 2d 169, 873 N.W.2d 528. The State argues that we need not address the merits of Shannon's arguments as they are procedurally barred by ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994), as Shannon failed to provide a sufficient reason for why the issue was not raised previously. The State also argues that waiver applies as Shannon failed to object to the jury instruction at trial. While the State's arguments have merit, we choose to address

[4] Second-degree intentional homicide has a sixty-year maximum prison exposure. WIS. STAT. §§ 940.05, 939.50(3)(b). Second-degree reckless homicide has a twenty-five-year maximum prison exposure. WIS. STAT. §§ 940.06, 939.50(3)(d).

the merits of the case without addressing the procedural defenses given the ineffective assistance of counsel claims.

## DISCUSSION

¶11 Intentional homicides in Wisconsin are divided into two categories: first-degree and second-degree. ***State v. Head***, 2002 WI 99, ¶60, 255 Wis. 2d 194, 648 N.W.2d 413. Both first- and second-degree intentional homicide under WIS. STAT. §§ 940.01(1)(a) and 940.05(1) require the state to prove beyond a reasonable doubt the same two elements: (1) the defendant caused the death of another human being and (2) the defendant acted with the intent to kill that person or another person. The difference between first- and second-degree intentional homicide is a matter of lessened prison exposure. First-degree intentional homicide carries a mandatory term of life imprisonment, while second-degree intentional homicide has a maximum sixty-year prison exposure. Second-degree intentional homicide is utilized if "mitigating circumstances"[5] are present.

[5] Under WIS. STAT. § 940.01(2), mitigating circumstances are affirmative defenses to prosecution which mitigate a crime from first-degree intentional homicide to second-degree intentional homicide and are defined as:

> (a) *Adequate provocation*. Death was caused under the influence of adequate provocation as defined in s. 939.44.
>
> (b) *Unnecessary defensive force*. Death was caused because the actor believed he or she or another was in imminent danger of death or great bodily harm and that the force used was necessary to defend the endangered person, if either belief was unreasonable.
>
> (c) *Prevention of felony*. Death was caused because the actor believed that the force used was necessary in the exercise of the privilege to prevent or terminate the commission of a felony, if that belief was unreasonable.
>
> (d) *Coercion; necessity*. Death was caused in the exercise of a privilege under s. 939.45 (1).

Sec. 940.01(2); ***Head***, 255 Wis. 2d 194, ¶62. Mitigating circumstances are affirmative defenses that equate to something less than cold-blooded murder, i.e., action caused by provocation, unnecessary force used in defending oneself, prevention of a felony, or coercion. *See* § 940.01(2).

¶12 If the State believes mitigating circumstances are present, the State charges a defendant with second-degree intentional homicide and must prove the same two elements as first-degree: the defendant caused the death of the victim and intended to kill the victim. WIS. STAT. § 940.05(1). If the State charges second-degree intentional homicide, the State is acknowledging that it cannot prove beyond a reasonable doubt that one of the mitigating circumstances was not present. Sec. 940.05(1)(b).

¶13 Self-defense in the realm of intentional homicides also has two categories: perfect self-defense and imperfect self-defense. Proof of perfect self-defense provides a complete exoneration of criminal liability, whereas proof of imperfect self-defense does not exonerate criminal liability, it mitigates culpability, i.e., a sentence less than life in prison. ***Head***, 255 Wis. 2d 194, ¶¶66, 85. Imperfect self-defense comes from our discarded manslaughter statute as a description for the causing of death "*unnecessarily*, in the exercise of [the person's] privilege of self-defense." ***Id.***, ¶68 (emphasis added). As the death was caused "unnecessarily," the "perfect" privilege of self-defense does not apply as the defendant's actions were not reasonable, hence "imperfect" self-defense.

¶14 To be successful in claiming perfect self-defense, the jury must find that the defendant "reasonably believed that an interference with [his] person involved the danger of imminent death or great bodily harm and reasonably believed that it was necessary to use force which was intended or likely to cause

death or great bodily harm to prevent or terminate that interference." ***Id.***, ¶66; *see also* WIS. STAT. 939.48(1). If a jury determines that a defendant's beliefs were *reasonable*, then the defendant "is not guilty of either first- or second-degree intentional homicide." ***Head***, 255 Wis. 2d 194, ¶67.

¶15 Imperfect self-defense applies where "a person intentionally caused a death but did so because [he] had an *actual* belief that [he] was in imminent danger of death or great bodily harm and an *actual* belief that the deadly force [he] used was necessary to defend [him] against this danger, if either of these beliefs was not reasonable. Under these circumstances, the crime of first degree intentional homicide is mitigated to second-degree intentional homicide." ***Id.***, ¶69 (emphasis added); *see also* WIS. STAT. § 940.01(2)(b). Imperfect self-defense does not result in the defendant being acquitted; it merely mitigates the charges from first-degree to second-degree intentional homicide. Sec. 940.01(2); ***Head***, 255 Wis. 2d 194, ¶85.

¶16 A defendant bears the burden of production to show that "some" evidence of imperfect self-defense exists. WIS. STAT. § 940.01(3); ***Head***, 255 Wis. 2d 194, ¶5. Once a defendant puts forth some evidence supporting imperfect self-defense, then the State, in order to obtain a conviction for first-degree intentional homicide, must prove beyond a reasonable doubt that the facts constituting the defense did not exist, i.e., the State must prove that the defendant did not actually believe that he was in imminent danger or did not actually believe that the force he used was necessary. ***Head***, 255 Wis. 2d 194, ¶70.

¶17 Shannon argues that as "some" evidence supported imperfect self-defense, it was error for the jury to not be instructed under WIS JI—CRIMINAL 1014. While evidence did exist to support the assertion of imperfect self-defense,

Shannon purposely and strategically decided, with advice of counsel, not to assert the affirmative defense of imperfect self-defense. WISCONSIN JI—CRIMINAL 1014 is utilized only when both perfect and imperfect self-defense are at issue. The jury was properly instructed under WIS JI—CRIMINAL 805.

¶18 Where a defendant, as a matter of strategy, does not request a lesser-included offense, the defendant cannot later claim error in the instructions. ***State v. Ambuehl***, 145 Wis. 2d 343, 356, 425 N.W.2d 649 (Ct. App. 1988). In ***Ambuehl***, trial counsel was accused of being deficient by not requesting a lesser-included instruction on endangering safety by conduct regardless of life and utilizing a "go-for-broke" strategy. The court rejected the defendant's claim of deficient performance, agreeing with the trial court that trial counsel had consulted with the defendant about the lesser-included offense and the decision to forgo the lesser-included was tactical. ***Id.*** at 356-57. In finding no ineffective assistance, the court determined that "[t]he 'go-for-broke' approach was intended to give the jury no alternative to attempted first-degree murder." ***Id.*** at 356. An "all-or-nothing" approach has been recognized in Wisconsin courts as a reasonable strategic decision whereby defense counsel excludes a lesser-included offense to force the jury into an acquittal by denying them a second option to convict. *See, e.g.*, ***State v. Kimbrough***, 2001 WI App 138, ¶¶31-35, 246 Wis. 2d 648, 630 N.W.2d 752.

¶19 A defendant has a right to "go-for-broke" or employ an "all-or-nothing" defense, but if that strategic decision fails, it is not deficient performance. *See* ***State v. Koller***, 87 Wis. 2d 253, 264, 274 N.W.2d 651 (1979) (explaining that trial counsel has "a right to select from the available defense strategies" and "[t]he fact that his strategy failed does not mean that his representation was inadequate");

***Lee v. State***, 65 Wis. 2d 648, 654-56, 223 N.W.2d 455 (1974) (trial tactics should be left to the judgment of trial counsel).

¶20 Shannon's primary strategy to the State's charge of first-degree intentional homicide was to show that someone in Smith's car caused Smith's death; his secondary strategy was that even if he caused Smith's death, it occurred under the privilege of perfect self-defense, i.e., that he reasonably believed his life was in imminent danger and he reasonably believed that it was necessary to use force which was intended or likely to cause death. If Shannon had been successful on either strategy, he would have walked out of the courtroom a free man.

¶21 Shannon was aware of and considered his right to have second-degree intentional homicide on the verdict. Shannon agreed with the advice of his counsel and chose an "all-or-nothing" strategy of going to trial solely on first-degree intentional homicide. Shannon's strategy was to beat the charge of first-degree intentional homicide by convincing the jury that the State did not meet its burden to prove that Shannon caused the death of Smith. Shannon's secondary strategy, that he acted in perfect self-defense, was also reasonable given the amount of gunfire coming out of the Smith vehicle.

¶22 The trial court accepted that trial counsel's strategy was made in consultation with Shannon and that "we went over it extensively." *See* ***Turner v. State***, 76 Wis. 2d 1, 18, 250 N.W.2d 706 (1977) (finding that "as to the credibility of disputed testimony in relation to evidentiary facts, this court will not substitute its judgment for that of the trial court"). Trial counsel was not deficient. Appellate counsel was likewise not deficient as trial counsel's performance was not deficient. *See* ***State v. Ziebart***, 2003 WI App 258, ¶15, 268 Wis. 2d 468, 673 N.W.2d 369.

*By the Court*.—Order affirmed.

Not recommended for publication in the official reports.