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

**April 10, 2018**

**Sheila T. Reiff**
**Clerk of Court of Appeals**



**Appeal No. 2016AP119-CR** **Cir. Ct. No. 2010CF004776**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**DEVIN T. WHITE,**

**DEFENDANT-APPELLANT.**

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APPEAL from an order of the circuit court for Milwaukee County: REBECCA F. DALLET, Judge. *Affirmed*.

Before Brennan, P.J., Brash and Dugan, JJ.

¶1 DUGAN, J. Devin T. White appeals an order of the trial court denying his postconviction motion for a new trial. White was convicted by a jury of first-degree reckless homicide with use of a dangerous weapon, WIS. STAT.

§ 940.02 (2015-16).[1] White essentially argues that (1) the trial court's instructions misapplied the law of self-defense as it pertains to first-degree reckless homicide and (2) trial counsel was ineffective for failing to object to the substance of the § 940.02 jury instruction on the grounds that it misstated the law by not properly instructing the jury that the State had the burden of proving beyond a reasonable doubt that White did not act lawfully in self-defense.

¶2 In denying White's postconviction motion for a new trial, the trial court found that "the instructions accurately stated the law as a whole" and that it had specifically included instructions that the State had the burden of proving beyond a reasonable doubt that White did not act in self-defense. It also found "that if the court did not organize the instructions in the proper order, the error was harmless." The trial court then found based on those conclusions "that trial counsel was not ineffective for failing to object to the jury instructions as given." This court agrees with the trial court. Therefore, we affirm.

## BACKGROUND

¶3 The parties do not dispute the material facts of this case. Additionally, although they disagree as to who fired the first shot—White or the

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

White was also convicted of being a felon in possession of a firearm. However, he does not challenge that conviction on appeal. White also raises no issue regarding that portion of his postconviction ineffective-assistance-of-counsel claim that asserted trial counsel was ineffective for failing to call five people as trial witnesses to support White's self-defense claim. Therefore, we do not address those matters.

victim, Montrealle Jackson—they agree that it was proper for the trial court to instruct the jury on self-defense.

¶4 The material facts are that on November 21, 2010, around 2:30 a.m., White and Jackson exchanged gunfire outside of a nightclub in Milwaukee. White arrived at the scene in a white SUV with two other men and parked across the street from the nightclub. As White crossed the street to get to the nightclub, he and Jackson exchanged gunfire. White was shot in the shoulder, and Jackson was shot in the head and died in the street.

¶5 The State's theory was that White, for unknown reasons, fired five shots at Jackson, who then returned fire, striking White in the shoulder with one of the two rounds he got off before he collapsed. White testified that he drove up with two men in the white SUV, crossed the street to look for his brother in the nightclub, but was shot by Jackson, a complete stranger, for no reason. White said he returned fire in self-defense to save his own life. The State argued to the jury that White did not act in self-defense—rather it was Jackson who acted in self-defense.

¶6 At the jury instruction conference, the trial court presented the proposed jury instructions to the parties. When asked by the trial court if the jury instructions were satisfactory, trial counsel said that "[b]ased on my review, yes, on behalf of …White." The State also said they were "fine."

¶7 As to the substantive crimes, the jury was instructed on both first-degree reckless homicide and the lesser-included offense of second-degree reckless homicide. The jury instruction on self-defense is at the heart of this appeal. All the relevant jury instructions will be discussed in detail below.

## APPLICABLE LAW

¶8 "A trial court has broad discretion in instructing a jury but must exercise that discretion in order to fully and fairly inform the jury of the applicable rules of law." *See* ***State v. Ziebart***, 2003 WI App 258, ¶16, 268 Wis. 2d 468, 673 N.W.2d 369. "Whether a jury instruction violated a defendant's right to due process is a legal issue subject to *de novo* review." ***Id.***

¶9 "On review, the language of a jury instruction should not be fractured into segments, one or two of which, when considered separately and out of context, might arguably be in error." ***State v. Paulson***, 106 Wis. 2d 96, 108, 315 N.W.2d 350 (1982). "Rather, the instruction must be read as a whole and for there to be reversible error, the error must permeate the underlying meaning of the instruction." ***Id.*** Additionally, we must "not view a single instruction to a jury in artificial isolation." ***State v. Glenn***, 199 Wis. 2d 575, 590, 545 N.W.2d 230 (1996). "Relief is not warranted unless the court is 'persuaded that the instructions, when viewed as a whole, misstated the law or misdirected the jury.'" ***Ziebart***, 268 Wis. 2d 468, ¶16 (citation omitted).

¶10 Failure to object to instructions at the jury instruction conference constitutes a waiver of any error.[2] *See* WIS. STAT. § 805.13(3); *see also* ***State v.***

[2] In ***State v. Ndina***, our supreme court clarified the distinction between the terms "forfeiture" and "waiver." *See* ***id.***, 2009 WI 21, ¶¶28-32, 315 Wis. 2d 653, 761 N.W.2d 612. "Although cases sometimes use the words 'forfeiture' and 'waiver' interchangeably, the two words embody very different legal concepts. 'Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right.'" ***Id.***, ¶29. (citation omitted).

Here, trial counsel approved the trial court's jury instruction. Either "waiver" or "forfeiture" may apply, but we use "waiver" to be consistent with WIS. STAT. § 805.13(3).

***Austin***, 2013 WI App 96, ¶20, 349 Wis. 2d 744, 836 N.W.2d 833. A claimed error in the jury instructions that has been waived by trial counsel's failure to object may be reviewed under a claim of ineffective assistance of counsel or under the court's discretionary reversal authority under WIS. STAT. § 752.35. *See* ***Austin***, 349 Wis. 2d 744, ¶20 (regarding using ineffective-assistance-of-counsel claim to challenge jury instructions); ***State v. Beasley***, 2004 WI App 42, ¶17 n.4, 271 Wis. 2d 469, 678 N.W.2d 600 (regarding using request for discretionary reversal to challenge jury instructions).

¶11 Under the Sixth and Fourteenth Amendments to the United States Constitution, a criminal defendant is guaranteed the right to effective assistance of counsel. ***State v. Balliette***, 2011 WI 79, ¶21, 336 Wis. 2d 358, 805 N.W.2d 334 (citing ***Strickland v. Washington***, 466 U.S. 668, 686 (1984)). A defendant must establish two elements to show that his counsel's assistance was constitutionally ineffective: (1) counsel's performance was deficient; and (2) "the deficient performance resulted in prejudice to the defense." ***Id.*** As to the second prong of the ineffective assistance of counsel test, prejudice occurs when the attorney's error is of such magnitude that there is a "reasonable probability" that, but for the error, the outcome would have been different. ***State v. Erickson***, 227 Wis. 2d 758, 769, 596 N.W.2d 749 (1999). "Stated differently, relief may be granted only where there 'is a probability sufficient to undermine confidence in the outcome,' i.e., there is a 'substantial, not just conceivable, likelihood of a different result.'" ***State v. Starks***, 2013 WI 69, ¶55, 349 Wis. 2d 274, 833 N.W.2d 146 (quoting ***Cullen v. Pinholster***, 563 U.S. 170, 189 (2011)).

¶12 The standard of review of the ineffective assistance of counsel components, deficient performance and prejudice, is a mixed question of law and fact. ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990) (citing

***Strickland***, 466 U.S. at 698). Thus, the trial court's findings of fact, "the underlying findings of what happened," will not be overturned unless clearly erroneous. ***Id.*** (citations omitted). "The ultimate determination of whether counsel's performance was deficient and prejudicial to the defense are questions of law which this court reviews independently." ***Id.*** at 128. "[C]ourts may reverse the order of the two tests or avoid the deficient performance analysis altogether if the defendant has failed to show prejudice." ***Id.***

## DISCUSSION

### White Bases his Jury Instruction Argument on an Incorrect View of the Law of Self-Defense in the First-Degree Reckless Homicide Context

¶13 White essentially argues that the trial court's jury instructions misapplied the law of self-defense as it pertains to first-degree reckless homicide. He argues that "State law holds that self-defense actual beliefs, even if unreasonable, preclude finding utter disregard and § 940.02."[3] He asserts that "the only crime a defendant can be convicted of when the State proves a defendant

[3] In support of this argument White cites (1) ***Ross v. State***, 61 Wis. 2d 160, 211 N.W.2d 827 (1973); (2) ***State v. Harp***, 150 Wis. 2d 861, 443 N.W.2d 38 (1988), *overruled by* ***State v. Camacho***, 176 Wis. 2d 860, 501 N.W.2d 380 (1993); and (3) ***State v. Head***, 2002 WI 99, 255 Wis. 2d 194, 648 N.W.2d 413. We note that ***Camacho***, 176 Wis. 2d 860, was subsequently modified by ***Head***, 255 Wis. 2d 194.

White also cites ***State v. Miller***, 2009 WI App 111, ¶¶37-40, 320 Wis. 2d 724, 772 N.W.2d 188, in support of his argument. However, ***Miller*** involved the sufficiency of the evidence to prove that Miller acted in utter disregard of human life. The court stated: "Miller's attack on his conviction for first-degree reckless injury turns on whether the evidence was sufficient to prove that he acted with 'utter disregard for human life.'" ***Id.***, ¶32.

acted unreasonably in self-defense, or fails to negate self-defense actual beliefs is § 940.05."[4]

¶14 White seems to be arguing that ***Harp*** and ***Head*** create a self-defense separate and distinct from WIS. STAT. § 939.48. Under White's interpretation of the law, the test for when a person is privileged to intentionally use force which is intended or likely to cause death or great bodily harm is whether that person *actually believes* that the other person is unlawfully interfering with him and that the force is necessary to prevent imminent death or great bodily harm to himself.

¶15 Under White's interpretation of the law, the State must prove beyond a reasonable doubt that he did not have these actual beliefs; therefore, the trial court erred in failing to instruct the jury of the State's burden and that White could not be found guilty if the State did not prove he did not have these actual beliefs. Under White's interpretation of the law, his actual belief controls, not whether his belief was reasonable.

¶16 White's interpretation of the law is directly contradicted by WIS. STAT. § 939.48(1), which provides,

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

[4] WISCONSIN STAT. § 940.05 involves second-degree intentional homicide.

(Emphasis added.) The statute clearly states that the person's beliefs regarding an unlawful interference with his or her person and the force necessary to terminate the interference must be reasonable. White's interpretation of the law is directly contradicted by the statute.

¶17 Moreover, White's reliance on ***Harp*** and ***Head*** misconstrues the holdings of those cases. Both involved charges of first-degree intentional homicide under WIS. STAT. § 940.01. *See* ***State v. Harp***, 150 Wis. 2d 861, 865, 443 N.W.2d 38 (1988), *overruled by* ***State v. Camacho***, 176 Wis. 2d 860, 881-82, 501 N.W.2d 380 (1993)[5]; and ***State v. Head***, 2002 WI 99, 255 Wis. 2d 194, 648 N.W.2d 413. A first-degree reckless homicide offense under WIS. STAT. § 940.02 was not at issue in either case.

¶18 What is discussed in those cases is the difference between "perfect self-defense as a complete affirmative defense to a charge of first-degree intentional homicide, and imperfect self-defense (unnecessary defensive force) to mitigate that charge." *See* ***Head***, 255 Wis. 2d 194, ¶3. The court in ***Head*** made it clear that it was addressing only first-degree intentional homicide cases: "We are speaking here in the context of *intentional* killings—not reckless killings, or negligent killings, or accidental killings." ***Id***., ¶67. The court further explained that

> Unnecessary defensive force, codified in WIS. STAT. § 940.01(2)(b), is the current equivalent of imperfect self-defense. It applies to situations in which 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

[5] As we previously stated, ***Camacho***, 176 Wis. 2d 860, was subsequently modified by ***Head***, 255 Wis. 2d 194.

> [he] used was necessary to defend [him] against this danger, if *either* of these beliefs was not reasonable.

***Id***., ¶69 (alteration added). The court then stated, "[u]nder these circumstances, the crime of *first-degree intentional homicide* is *mitigated to second-degree intentional homicide*." ***Id***. (emphasis added).

¶19 White's argument attempts to incorporate the mitigating circumstances found in WIS. STAT. § 940.01(2) and discussed in ***Head*** into WIS. STAT. § 940.02. He asserts ***Harp*** states, "[e]xcessive self-defense is not an absolute defense but it affects the nature of [§ 940.02]." *See* ***Harp***, 150 Wis. 2d at 883.

¶20 White misquotes ***Harp***. What the case says is "[e]xcessive self-defense is not an absolute defense but it affects the nature of *the crime of murder*. The legislature recognized that fact by creating the crime of manslaughter/imperfect self-defense." ***Id.*** The ***Harp*** court is explaining what mitigates first-degree intentional homicide to manslaughter (now, second-degree intentional homicide). Contrary to White's position, the ***Harp*** language has nothing to do with first-degree reckless homicide.

¶21 White also asserts that ***Ross v. State*** holds that "imperfect self-defense is innocent of § 940.02." White misrepresents the holding in ***Ross***, which involved a charge of first-degree murder and circumstances where Ross was found guilty of second-degree murder.[6] ***Id.***, 61 Wis. 2d 160, 162, 211 N.W.2d 827

[6] We admonish White's appellate counsel for misrepresenting the "quoted" statement from ***Harp*** and the ***Ross*** holding. These misrepresentations violate WIS. STAT. § 802.05(2)(b) which states in relevant part, that "[b]y presenting to the court,…an attorney…is certifying …[that] the…legal contentions stated in the paper are warranted by existing law or by a nonfrivolous argument" for a change in the law." Section 802.05(2)(b) is made applicable to appeals pursuant to WIS. STAT. RULE 809.84.

(continued)

(1973). The court never said that if imperfect self-defense exists that a person is not guilty of first-degree reckless homicide. First, as established above, imperfect self-defense only applies to a charge of first-degree intentional homicide and mitigates that charge to second-degree intentional homicide. Moreover, manslaughter is not the equivalent of WIS. STAT. § 940.02, first-degree reckless homicide. It was the equivalent of WIS. STAT. § 940.05, second-degree intentional homicide.[7] *See* ***Head***, 255 Wis. 2d 194, ¶¶61 & 80 n.9.

¶22 We hold that WIS. STAT. § 939.48 sets forth the law regarding self-defense applicable to the charge of first-degree reckless homicide in this case and that the mitigating circumstance of unnecessary defensive force set forth in WIS. STAT. § 940.01(b), first-degree intentional homicide, only applies to that statute and not to WIS. STAT. § 940.02. Therefore, the trial court properly instructed the jury on the applicable standard for self-defense in relation to first-degree reckless homicide.

**The Jury Instructions Were Not Erroneous**

¶23 White essentially argues that the trial court's jury instructions misapplied the law of self-defense as it pertains to first-degree reckless homicide.

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The misrepresentations also violate SCR 20:3.3(a)(1)(2007) which provides that "[a] lawyer shall not knowingly…make a false statement of fact or law to a tribunal." Any knowing misrepresentation of a court's statement or holding in a decision by counsel is contrary to counsel's professional obligations to the parties, the public and the court. *See* ***Wisconsin Nat. Gas Co. v. Gabe's Const. Co., Inc.***, 220 Wis. 2d 14, 18 n.3, 582 N.W.2d 118 (Ct. App. 1998)("misleading statements in briefs" violate "SCR 20:3.3, which requires candor toward tribunals.").

[7] The law of homicide was revised in 1988 as explained in detail in ***Head***, 255 Wis. 2d 194, ¶¶54-62. The revision included new terms for homicides, defenses, and mitigating circumstances.

As noted, jury instructions are not erroneous if, taken as a whole, they adequately and properly inform the jury. Jury instructions are not reviewed in isolation but rather must be viewed in the context of the overall charge. Only when the instructions viewed as a whole, misstate the law or misdirect the jury is a defendant entitled to relief. *See* ***Ziebart***, 268 Wis. 2d 468, ¶16.

¶24 We consider the jury instructions as a whole. Here, the trial court first advised the jury that White was charged with first-degree reckless homicide and then, even before addressing the elements of the offense, the trial court told the jury that White pled not guilty to that charge, "which means the State must prove every element of the offense charged beyond a reasonable doubt."

¶25 Moreover, during its instructions, the trial court instructed the jury on the presumption of innocence and burden of proof as follows:

> 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.

The instructions make clear that the only party that had a burden of proof was the State.

¶26 Further, the trial court initially addressed both the first- and second-degree reckless homicide charges together because common elements apply to each of the two crimes. After telling the jury that White was charged with first-degree reckless homicide, the trial court immediately told the jury that if they were

not satisfied that White was guilty of that charge, they were required to consider whether he was guilty of the lesser-included offense of second-degree reckless homicide. The trial court stated that:

> Both first[-] and second[-]degree reckless homicide require that the defendant caused the death of the victim by criminally reckless conduct. First[-]degree reckless homicide requires the State to prove the additional fact that the circumstances of the defendant's conduct showed utter disregard for human life…*It will also be important for you to consider the privilege of self-defense in deciding which crime, if any, the defendant has committed.*

(Emphasis added.) The trial court was addressing both charges when it made reference to the privilege of self-defense.

¶27 In instructing the jury about both charges, the trial court frequently and pointedly instructed the jury to consider White's privilege of self-defense. When instructing the jury on self-defense the trial court stated:

> Self-defense is an issue in this case. 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 the defendant used or threatened to use was necessary to prevent or terminate the interference and the defendant's beliefs were reasonable.
>
> 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.

The trial court then went on to instruct the jury regarding duty to retreat and provocation and noted that self-defense is implicated as a part of provocation:

> A person who engages in unlawful conduct of a type likely to provoke others to attack and who does provoke an attack is not allowed to use or threaten force in self-defense

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

¶28 Throughout these instructions, the trial court was referencing both the first-degree reckless homicide charge and the second-degree reckless homicide charge. It was only after referencing both crimes together and stating that self-defense was applicable to each, that the trial court then told the jury that it would define each crime in greater detail and proceeded to identify the elements of each offense. It read the statutory definition of first-degree reckless homicide and then advised the jury that "[b]efore you may find the defendant guilty of first[-]degree reckless homicide, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present."

¶29 Clearly the trial court was instructing the jury that the State, not White, had the duty to prove beyond a reasonable doubt that all three elements were present. The trial court then stated that the first element was that White caused the death of Jackson. The issue of self-defense was again raised in relation to the second element—that White caused the death of Jackson by criminally reckless conduct. In the instruction, the trial court highlighted that self-defense would negate the "unreasonable risk" element of criminally reckless conduct. It stated:

> Two, the defendant caused the death by criminally reckless conduct. Criminally reckless conduct means the conduct created a risk of death or great bodily harm to another person and the risk of death or great bodily harm was unreasonable and substantial and the defendant was aware that his conduct created the unreasonable and substantial risk of death or great bodily harm. You should consider the evidence related 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.*

(Emphasis added.) Clearly the trial court instructed the jury that evidence of self-defense was relevant to determining whether the second element—that White caused the death of Jackson by criminally reckless conduct—was proved. Further, at the beginning of the instruction, it told the jury that the State had the burden to prove beyond a reasonable doubt that all three elements, including the element of criminally reckless conduct, were present.

¶30 Additionally, as to the third element—that "the circumstances of [White's] conduct showed utter disregard for human life"—the trial court instructed the jury that "[y]ou should consider the evidence relating to *self-defense* in deciding whether the defendant's conduct showed utter disregard for human life." (Emphasis added.) By this instruction, the trial court instructed the jury that self-defense was a part of the third element—that White's conduct showed utter disregard for human life. Just as it did for the second element, the trial court instructed the jury that the State had the burden to prove beyond a reasonable doubt that all three elements, including utter disregard for human life, were present.

¶31 Moreover, as the trial court went on to instruct the jury regarding second-degree reckless homicide, it again referenced the common elements of both crimes. It stated that:

> [t]he difference between first[-] and second[-]degree reckless homicide is that the first[-]degree offense requires proof of one additional element. That the circumstances of the defendant's conduct showed utter disregard for human life. *The State must prove by evidence which satisfies you beyond a reasonable doubt that defendant did not lawfully act in self-defense.*

(Emphasis added.) Here, the trial court was stating that the State had the burden to prove beyond a reasonable doubt that White did not lawfully act in self-defense as to both charges.

¶32 Throughout the jury instructions, the trial court addressed both crimes together. It consistently, pointedly, and frequently instructed the jury to consider White's privilege of self-defense and to remember that the State had the burden to prove every element of each offense charged. It pointed out that not lawfully acting in self-defense was an element of each offense. Moreover, while addressing both first-degree reckless homicide and second-degree reckless homicide, the trial court instructed the jury that "the State must prove by evidence which satisfies you beyond a reasonable doubt that [the] defendant did not lawfully act in self-defense." Further, as noted above, the trial court instructed the jury that "defendants are not required to prove their innocence. The law presumes every person charged with the commission of an offense to be innocent….The burden of establishing every fact necessary to constitute guilt is upon the State."

¶33 Citing numerous cases, White argues that the State has the burden of proving that White did not act lawfully in self-defense. He states that, "If the jury applied the law as directed, it was contrary to ***Moes***, ***Staples***, and ***Harp***,[[8]] which all hold that that the absence of self-defense is an additional burden to the [s]tatutory elements of any crime that must be proved beyond a reasonable doubt." White devotes a significant amount of his brief to arguing that the State has the burden of proof to disprove self-defense.

[8] ***Moes v. State***, 91 Wis. 2d 756, 284 N.W.2d 66 (1979), ***State v. Staples***, 99 Wis. 2d 364, 299 N.W.2d 270 (Ct. App. 1980), and ***Harp***, 150 Wis 2d at 861.

¶34 However, the State readily concedes not only that it had the burden to disprove self-defense, but also asserts that it assumed the burden at trial. Further, the State asserts that trial counsel repeatedly argued to the jury that the State failed to prove that White did not act reasonably in self-defense. The State also points out that it did not dispute trial counsel's interpretation of the trial court's instructions, or trial counsel's summary of the law of self-defense, including the State's burden to disprove it.

¶35 White also asserts that the trial court erred by including the State's self-defense burden in the jury instruction for the second-degree reckless homicide charge, but omitting it from the instruction for the first-degree reckless homicide charge. For support of his argument, White principally relies on ***Austin***, 349 Wis. 2d 744.

¶36 However, as explained in ***State v. Langlois***, the problem in ***Austin*** was that the trial court's jury instructions had absolutely *no* instruction on the burden of proof relative to the defense of self-defense. *See* ***Langlois***, 2017 WI App 44, ¶31, 377 Wis. 2d 302, 901 N.W.2d 768, *review granted*, 2018 WI 5, __ Wis. 2d __, 906 N.W.2d 452. As this court also explained,

> Further, on the instruction for the defense of others, at least with respect to the counts charging first-degree recklessly endangering safety, the court told the jury that the State bore the burden of disproving defense of others beyond a reasonable doubt. In juxtaposition—the lack of an instruction on the burden of proof relative to self-defense, with the specific instruction on the burden of proof of defense of others—it was reasonably likely that the jury would have concluded that the defendant bore the burden of proof on self-defense. In other words, the jury would have inferred that the defendant bore the burden of proof on self-defense.

***Id.*** (citation omitted).

¶37 However, here, in contrast, the instructions pointedly, consistently and frequently told the jury to consider White's privilege of self-defense as to both charges. They also informed the jury that the State had the burden of proof as to all the elements of each offense, including self-defense that was an element of each offense. They also instructed that the State had to prove beyond a reasonable doubt that defendant did not lawfully act in self-defense.

¶38 We hold that the overall meaning communicated by the instructions as a whole was a correct statement of the law and, therefore, no grounds exist for reversal on that basis. *See* ***Ziebart***, 268 Wis. 2d 468, ¶16.

**White has not Shown that Trial Counsel was Ineffective in Not Objecting to the Jury Instructions**

¶39 White argues that trial counsel was ineffective in failing to object to the jury instructions discussed above. As noted, a defendant claiming ineffective assistance must establish both deficient performance and prejudice. However, "a claim predicated on a failure to challenge a *correct* trial court ruling cannot establish either." *See* ***id.***, ¶14 (citing ***State v. Wheat***, 2002 WI App 153, ¶14, 256 Wis. 2d 270, 647 N.W.2d 441 ("counsel's failure to present legal challenge is not deficient performance if challenge would have been rejected") and ***State v. Jackson***, 229 Wis. 2d 328, 344, 600 N.W.2d 39 (Ct. App. 1999) ("counsel's failure to present legal challenge is not prejudicial if defendant cannot establish challenge would have succeeded")). Because we hold that the trial court properly

instructed the jury, White's "ineffective-assistance-of-counsel claim must fail." ***Langlois***, 377 Wis. 2d 302, ¶23. *See also* ***Ziebart***, 268 Wis. 2d 468, ¶17.[9]

**White is not Entitled to a New Trial in the Interest of Justice**

¶40 White also relies on WIS. STAT. § 752.35, contending that he is entitled to a new trial in the interest of justice because the real controversy of self-defense was not fully and fairly tried, and because of a miscarriage of justice, claiming that he is "actually innocent under the correct application of WIS. STAT. § 940.02 and utter disregard." Section 752.35 affords this court discretion to "reverse the judgment or order appealed from" and "direct the entry of the proper judgment or remit the case to the trial court ... as [is] necessary to accomplish the ends of justice." *See* WIS. STAT. § 752.35.

¶41 A miscarriage of justice may be found when there is "a probability of a different result on retrial such that a new trial in the interest of justice is warranted." *See* ***State v. Kucharski***, 2015 WI 64, ¶46, 363 Wis. 2d 658, 866 N.W.2d 697 (citations omitted). However, such discretionary reversal power is exercised only in "'exceptional cases.'" *See* ***State v. Burns***, 2011 WI 22, ¶25, 332 Wis. 2d 730, 798 N.W.2d 166. *See also*, ***State v. Watkins***, 2002 WI 101, ¶79, 255 Wis. 2d 265, 647 N.W.2d 244 (concluding that discretionary reversal power "should be exercised sparingly and with great caution").

[9] White also argues that "trial counsel unreasonably failed to prevent the deprivation of White's right to a unanimous jury trial and verdict on the absence of the self-defense elements." This argument is based on White's interpretation of the law of self-defense as described and his contention that the trial court failed to properly instruct the jury. For the reasons we rejected those arguments, we also reject this argument.

¶42 White argues that the real controversy was not fully tried because the trial court misapplied the law of self-defense and the jury instructions misstated the law regarding the burden of proof regarding self-defense. Based on our conclusions that the trial court applied the law of self-defense properly and the jury instructions were proper, we reject his argument. *See* ***State v. McKellips***, 2016 WI 51, ¶51, 369 Wis. 2d 437, 881 N.W.2d 258. We hold that the real controversy was fully tried.

## CONCLUSION

¶43 For the reasons stated above, we hold that WIS. STAT. § 939.48 sets forth the law regarding self-defense applicable to the first-degree reckless homicide charge under WIS. STAT. § 940.02 against White. We also hold that the mitigating circumstance of unnecessary defensive force set forth in WIS. STAT. § 940.01(b), the first-degree intentional homicide statute, applies only to that statute and not to § 940.02. Therefore, we conclude that the trial court properly instructed the jury on the applicable standard for self-defense in relation to first-degree reckless homicide.

¶44 We also hold that the overall meaning communicated by the instructions, as a whole, was a correct statement of the law and the instructions comported with the facts of the case. Additionally, because the trial court properly instructed the jury, White's ineffective-assistance-of-counsel claim must fail, and the real controversy was fully tried. White is not entitled to a new trial in the interest of justice. Therefore, we affirm the trial court's order.

*By the Court*.—Order affirmed.

Not recommended for publication in the official reports.