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

February 20, 2001

**Cornelia G. Clark**
**Clerk, Court of Appeals**
**of Wisconsin**



**No. 00-0383-CR**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**v.**

**JAMES P. HENDERSON,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and order of the circuit court for Milwaukee County: LAURENCE GRAM and KITTY K. BRENNAN, Judges. *Affirmed.*

Before Fine, Schudson and Curley, JJ.

¶1 PER CURIAM. James P. Henderson appeals from a judgment of conviction entered on a jury verdict finding him guilty of first-degree reckless

injury, in violation of WIS. STAT. § 940.23(1).[1] He also appeals from an order denying his postconviction motion.[2] Henderson claims: (1) he was denied due process because the trial court erroneously instructed the jury on self-defense; (2) he was deprived of the effective assistance of counsel because his trial lawyer did not object to the trial court's self-defense instruction; and (3) his trial lawyer was ineffective for failing to request the lesser-included offense of second-degree reckless injury. We affirm.

## I. BACKGROUND

¶2 Henderson paid Michael Jennings to fix his truck. At trial, Henderson testified that he paid Jennings seventy dollars in advance to fix his truck and that he then made two subsequent payments of thirty-five and twenty-five dollars. All three payments were made in October. Henderson testified that Jennings had started work on the truck but had not finished. When asked if he "wanted the truck done" on November 21st, Henderson replied, "Right. It had been a month and a half." While Jennings was fixing the truck outside of Henderson's residence on that date, Henderson—upset and mad that his truck was not yet fixed—struck him with a baseball bat. Jennings suffered serious head injuries resulting from a blow to the front and top of the head.

¶3 Henderson testified that he heard Jennings swearing while working on the truck and went outside to confront him. Henderson testified that he saw a tool in Jennings's hand. He stated that he then picked up a bat and struck Jennings

[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

[2] The Honorable Laurence Gram presided over the jury trial; the Honorable Kitty Brennan decided the postconviction motion.

in self-defense. Henderson admitted striking Jennings once in the arm while Jennings was holding the tool and again in the arm after Jennings had dropped the tool but was "walk[ing] up on [him]." Henderson denied causing any head injuries to Jennings, testifying that "a guy told me that a car fell on his head." Derrick Norris, a neutral witness, testified that he saw Henderson hit Jennings in the head with a baseball bat after Jennings fell down.

¶4 Defense counsel requested that the jury be instructed on self-defense pursuant to WIS JI–CRIMINAL 801, but later acquiesced to the court's use of a different self-defense instruction, WIS JI–CRIMINAL 805. Defense counsel did not request a lesser-included instruction to second-degree reckless injury. As noted, the jury convicted Henderson of first-degree reckless injury.

¶5 Henderson moved for postconviction relief, claiming ineffective assistance of trial counsel. The postconviction court denied his motion without a hearing, concluding that Henderson was not prejudiced by trial counsel's failure to object to WIS JI–CRIMINAL 805. The postconviction court determined that based on the evidence adduced at trial it was not reasonably probable that the jury would have found that Henderson acted in self-defense, regardless of which self-defense instruction was given. Additionally, the postconviction court determined that the lesser-included offense of second-degree reckless injury was not warranted under the circumstances of this case, and therefore, Henderson was not deprived of the effective assistance of counsel when his trial lawyer failed to request it.

## II. DISCUSSION

### *A. Waiver*

¶6 Henderson first claims that he was denied due process because the trial court erroneously instructed the jury on self-defense, using WIS JI–CRIMINAL 805, rather than WIS JI–CRIMINAL 801. Henderson did not object to the trial court's instruction of the jury.[3] Thus, Henderson's right to raise this issue on appeal has been waived. ***State v. Schumacher***, 144 Wis. 2d 388, 409, 424 N.W.2d 672, 680 (1988) (failure to object to proposed instructions at trial constitutes waiver of any right to challenge an instruction on appeal). We nonetheless consider trial counsel's failure to object to WIS JI–CRIMINAL 805 in the context of Henderson's ineffective-assistance-of-counsel claim. ***State v. Marcum***, 166 Wis. 2d 908, 916, 480 N.W.2d 545, 550 (Ct. App. 1992) (While "the court of appeals is prohibited from reviewing instructions … absent a timely objection," jury instructions "may be revisited under claims of ineffective assistance of counsel.").[4]

### *B. Ineffective-Assistance-of-Counsel Claims*

¶7 A defendant claiming ineffective assistance of counsel must prove both that his or her lawyer's representation was deficient and, as a result, that he or she suffered prejudice. ***Strickland v. Washington***, 466 U.S. 668, 690, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); ***State v. Johnson***, 133 Wis. 2d 207, 216–217, 395

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[3] Defense counsel failed to object to WIS JI–CRIMINAL 805 three times: (1) at the instructions conference the trial court stated, "805 would seem to be [the] appropriate one then," to which counsel responded "yes"; (2) when the trial court listed the proposed jury instructions; and (3) when the trial court asked if there was any objection to the jury instructions as given.

[4] In his reply brief to this court, Henderson acknowledges, "because trial counsel acquiesced in the erroneous instruction, this issue must be addressed under the rubric of an ineffective counsel claim."

N.W.2d 176, 181 (1986). To prove deficient performance, a defendant must show specific acts or omissions of counsel that were "outside the wide range of professionally competent assistance." ***Strickland***, 466 U.S. at 690. We "strongly presume" counsel has rendered adequate assistance. ***Id.*** To show prejudice, a defendant must demonstrate that the result of the proceeding was unreliable. ***Id.***, 466 U.S. at 687. If a defendant fails on either aspect—deficient performance or prejudice—the ineffective-assistance-of-counsel claim fails. ***Id.***, 466 U.S. at 697.

¶8 Whether a lawyer gives a defendant ineffective assistance of counsel is a mixed question of law and fact. ***Johnson***, 133 Wis. 2d at 216, 395 N.W.2d at 181. The trial court's findings of fact will be upheld unless they are clearly erroneous. ***State v. Pitsch***, 124 Wis. 2d 628, 634, 369 N.W.2d 711, 714 (1985). Where, as here, the postconviction court did not preside over the trial, however, we review the postconviction court's findings of fact *de novo*. ***State v. Herfel***, 49 Wis. 2d 513, 521, 182 N.W.2d 232, 237 (1971). Whether proof satisfies either the deficiency or the prejudice prong is a question of law that this court also reviews *de novo*. ***Pitsch***, 124 Wis. 2d at 634, 369 N.W.2d at 715.

¶9 If a defendant files a postconviction motion and alleges facts that, if true, would entitle the defendant to relief, the trial court must hold an evidentiary hearing. ***State v. Bentley***, 201 Wis. 2d 303, 309, 548 N.W.2d 50, 53 (1996). Whether the motion alleges sufficient facts that, if true, would entitle the defendant to relief is a question of law, which we review *de novo*. ***Id.***, 201 Wis. 2d at 310, 548 N.W.2d at 53. We conclude that the postconviction court properly denied Henderson's motion without an evidentiary hearing in this case. ***Bentley***, 201 Wis. 2d at 309–310, 548 N.W.2d at 53 (circuit court has discretion to deny claim without a hearing if the record conclusively demonstrates that defendant is not entitled to relief). Henderson has not shown that he was prejudiced, either by

counsel's failure to object to the WIS JI–CRIMINAL 805 or by counsel's failure to request the lesser-included offense of second-degree reckless injury.

1. Trial Counsel's Failure to Object to WIS JI–CRIMINAL 805.

¶10 Henderson first argues that his trial lawyer was ineffective for failing to object to WIS JI–CRIMINAL 805, the standard self-defense instruction for an intentional offense, and not asking for WIS JI–CRIMINAL 801, which is intended for use with crimes involving criminal recklessness.[5] Relying on WIS JI–

[5] WIS JI–CRIMINAL 801 provides, as material here:

> **PRIVILEGE: SELF-DEFENSE: FORCE LESS THAN THAT LIKELY TO CAUSE DEATH OR GREAT BODILY HARM: CRIMES INVOLVING RECKLESSNESS OR NEGLIGENCE.**
>
> [INSERT THE FOLLOWING AFTER THE FIRST PARAGRAPH OF THE INSTRUCTION ON THE CRIME CHARGED BUT BEFORE THE ELEMENTS ARE DEFINED.]
>
> In deciding whether the defendant's conduct (was criminally reckless conduct which showed utter disregard for human life) (was criminally reckless conduct), you should also consider whether the defendant acted lawfully in self-defense.
>
> The law allows the defendant to act in self-defense only if the defendant believed that there was an actual or imminent unlawful interference with the defendant's person and believed that the amount of force he used or threatened to use was necessary to prevent or terminate the interference.
>
> In addition, the defendant's beliefs must have been reasonable. A belief may be reasonable even though mistaken. In determining whether the defendant's beliefs were reasonable, the standard is what a person of ordinary intelligence and prudence would have believed in the defendant's position under the circumstances that existed at the time of the alleged offense. The reasonableness of the defendant's beliefs must be determined from the standpoint of the defendant at the time of his acts and not from the viewpoint of the jury now.
>
> [CONTINUE WITH THE DEFINITION OF THE ELEMENTS OF THE CRIME.]

(continued)

> 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.
>
> [You should consider the evidence relating to self-defense in deciding whether the defendant's conduct showed utter disregard for human life.]
>
> CONTINUE WITH THE CONCLUDING PARAGRAPHS OF THE INSTRUCTION.

(Footnotes omitted.)

WIS JI–CRIMINAL 805 provides, as material here:

> **PRIVILEGE: SELF-DEFENSE: FORCE INTENDED OR LIKELY TO CAUSE DEATH OR GREAT BODILY HARM—§ 939.48**
>
> [INSERT THE FOLLOWING AFTER THE ELEMENTS OF THE CRIME ARE DEFINED BUT BEFORE THE CONCLUDING PARAGRAPHS.]
>
> Self-defense is an issue in this case. The law of self-defense allows a person to threaten or intentionally use force against another under certain circumstances.
>
> The State must prove by evidence which satisfies you beyond a reasonable doubt that the defendant was not acting lawfully in self-defense.
>
> The law allows the defendant to act in self-defense only if the defendant believed that there was an actual or imminent unlawful interference with the defendant's person and believed that the amount of force he used or threatened to use was necessary to prevent or terminate the interference. The defendant may intentionally use force which is intended or likely to cause death or great bodily harm only if he believed that such force was necessary to prevent imminent death or great bodily harm to himself.
>
> In addition, the defendant's beliefs must have been reasonable. A belief may be reasonable even though mistaken. In determining whether the defendant's beliefs were reasonable, the standard is what a person of ordinary intelligence and prudence would have believed in the defendant's position under the circumstances that existed at the time of the alleged offense. The reasonableness of the defendant's beliefs must be

(continued)

CRIMINAL 801, cmt. 1, and ***Werner v. State***, 66 Wis. 2d 736, 226 N.W.2d 402 (1975), Henderson claims that WIS JI–CRIMINAL 801 must be used in cases where a reckless rather than an intentional crime is at issue.[6] We disagree.

¶11 WISCONSIN JI–CRIMINAL 801, cmt. 1, states: "Because criminal recklessness or criminal negligence and lawful actions in self-defense cannot coexist, it is best to advise the jury to consider the law relating to self-defense when considering those elements." While this comment indicates that WIS JI–CRIMINAL 801 is the "best" approach to instructing on self-defense when a defendant is charged with a reckless crime, this does not mean that 801 is the *only permissible* approach. Indeed, trial courts have wide discretion in instructing a jury as long as the jury is fully and fairly informed. ***Nowatske v. Osterloh***, 198 Wis. 2d 419, 428, 543 N.W.2d 265, 268 (1996).

¶12 Henderson also claims that ***Werner v. State*** supports his argument that WIS JI–CRIMINAL 801 should have been given. However, ***Werner*** is

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> determined from the standpoint of the defendant at the time of his acts and not from the viewpoint of the jury now.
>
> If you are satisfied beyond a reasonable doubt that [SUMMARIZE THE ELEMENTS OF THE CRIME BY REFERRING TO THE RELEVANT INSTRUCTION, THEN CONTINUE WITH THE FOLLOWING] and that the defendant did not act lawfully in self-defense, you should find the defendant guilty.
>
> If you are not so satisfied, you must find the defendant not guilty.

(Footnotes omitted.)

[6] Henderson also argues that he was prejudiced because self-defense operates as a negative defense under WIS JI–CRIMINAL 801 and an affirmative defense under WIS JI–CRIMINAL 805. The jury was told, however, that the State had the burden to prove beyond a reasonable doubt that Henderson was "not acting lawfully in self-defense" before the jury could convict.

distinguishable from the present case and does not support Henderson's position. In ***Werner***, the defendant was on trial for second-degree murder, a crime that did not have an intent element. ***Werner***, 66 Wis. 2d at 739, 226 N.W.2d at 403. Nevertheless, the jury was instructed using an earlier form of WIS JI–CRIMINAL 805, which provided that it could convict Werner if it found "that the defendant did intentionally cause the death of Russell Karlen." ***Id.***, 66 Wis. 2d at 748, 226 N.W.2d at 407. The Wisconsin Supreme Court found the instruction to be legally erroneous and specifically noted, "This defect could have been cured if the court had either used the phrase 'use force intended or likely to cause death or great bodily harm against' or simply deleted the word 'intentionally.'" ***Id.***, 66 Wis. 2d at 749, 226 N.W.2d at 408. Unlike the ***Werner*** instruction, however, present WIS JI–CRIMINAL 805 does not condition the applicability of the law of self-defense on a finding of intent to do harm. Therefore, ***Werner*** is inapplicable.

¶13 On the facts of this case, the distinctions between WIS JI–CRIMINAL 801 and WIS JI–CRIMINAL 805 made no difference. The privilege of self defense turns on a defendant's "reasonabl[e] belie[f] that such force [was] necessary to prevent imminent death or great bodily harm to himself." WIS. STAT. § 939.48(1). Both instructions included this requirement. Moreover, Henderson's own testimony fails to support the finding of a reasonable belief that the victim was threatening an unlawful interference with his person:

> Q [by State] So he doesn't threaten you. He doesn't try to hit you but you take your baseball bat and you hit him on the arm, right?
>
> A Right.

Additionally, Henderson testified that Jennings dropped the alleged threatening tool before the hit that caused great bodily harm. Thus, regardless of whether WIS JI–CRIMINAL 801 or 805 was given to the jury, there is no reasonable probability

that Henderson would have avoided conviction by virtue of his claimed self-defense. Accordingly, his trial lawyer was not ineffective for failing to object to the self-defense instruction given by the trial court.[7]

2. Trial Counsel's Failure to Request Second-Degree Reckless Injury.

¶14 Henderson next argues that his trial lawyer was ineffective for failing to request the lesser-included offense of second-degree reckless injury. We disagree. Whether the evidence at trial supports submission of a lesser-included offense is a question of law that we review *de novo*. ***State v. Kramar***, 149 Wis. 2d 767, 792, 440 N.W.2d 317, 327 (1989). In determining the appropriateness of submitting a lesser-included offense instruction, we must apply a two-step test. ***State v. Muentner***, 138 Wis. 2d 374, 387, 406 N.W.2d 415, 421 (1987). First, we must determine whether the lesser offense is, as a matter of law, a lesser-included offense of the crime charged. ***Id.*** Second, we must determine whether the instruction is justified—that is, whether there is a reasonable basis in the evidence for acquittal on the greater offense and conviction on the lesser. ***Id.*** Thus, an instruction on a lesser-included crime should be submitted only if there is some basis in the evidence for a reasonable doubt as to an element necessary for conviction of the charged offense. ***State v. Foster***, 191 Wis. 2d 14, 23, 528 N.W.2d 22, 26 (Ct. App. 1995). Finally, the reviewing court must view all the

[7] In an undeveloped argument Henderson asserts that WIS JI–CRIMINAL 805 could have misled the jury into believing that he conceded that he intentionally used force likely to cause great bodily harm. But that contention could apply to either self-defense instruction. Indeed, any act of "self-defense" is, perforce, volitional, and Henderson does not further explain how he was prejudiced in this regard by the trial court's giving WIS JI–CRIMINAL 805 rather than WIS JI–CRIMINAL 801. We will not consider arguments that are undeveloped. ***State v. O'Connell***, 179 Wis. 2d 598, 609, 508 N.W.2d 23, 27 (Ct. App. 1993).

relevant evidence in a light most favorable to the defendant and the requested instruction. ***State v. Davis***, 144 Wis. 2d 852, 855, 425 N.W.2d 411, 412 (1988).

¶15 Here, it is not disputed that the first step is satisfied—second-degree reckless injury is a lesser-included offense of first-degree reckless injury. The difference between the two crimes is the absence of "utter disregard for human life" from the definition of second-degree reckless injury.[8] Thus, we need examine only whether the evidence meets the second step of the test warranting submission of the second-degree reckless injury instruction. A review of the record reveals that there is no reasonable basis in the evidence for a jury to acquit on the greater offense of first-degree reckless injury and to convict on the lesser offense of second-degree reckless injury.

¶16 Henderson argues that there was a reasonable basis in the evidence for the jury to find that his conduct did not show "utter disregard for human life," therefore making it possible for the jury to convict on second-degree but acquit on first-degree reckless injury. Henderson bases his argument on the following evidence: (1) Henderson testified that he struck the victim twice on the right shoulder, that he didn't hit him very hard, that the victim tripped and fell, that during the fall the second strike "bounced on the shoulder" and hit Jennings in the ear, and that when Henderson left, Jennings was getting up; (2) Robert Ford, a

[8] WISCONSIN STAT. § 940.23 provides, as material here:

> **(1)** FIRST-DEGREE RECKLESS INJURY. (a) Whoever recklessly causes great bodily harm to another human being under circumstances which show utter disregard for human life is guilty of a Class C felony.
>
> **(2)** SECOND-DEGREE RECKLESS INJURY. (a) Whoever recklessly causes great bodily harm to another human being is guilty of a Class D felony.

friend of Henderson's, testified that Jennings fell backward, that he did not see Henderson hit Jennings on the head, and that Ford assisted Jennings when Jennings tried to get up; and (3) Jennings testified that he could not recall where or how Henderson hit him. Henderson believes that, based on this evidence, the jury could have found he only aimed at Jennings's arm, which would show *some* regard for human life. We are not persuaded.

¶17 The physical facts contradict Henderson's assertion that he did not cause the victim's severe head injury. ***Hawthorne v. State***, 99 Wis. 2d 673, 683, 299 N.W.2d 866, 870 (1981) (The issue whether trial court erred by failing to give lesser-included instruction boils down to whether the physical facts brought out by the state contradict the defendant's testimony so as to leave no reasonable basis for a finding of the lesser-included offense); ***State v. Estrada***, 63 Wis. 2d 476, 483, 217 N.W.2d 359, 363 (1974) ("[S]ince the physical evidence contradicted the defendant's testimony and since his credibility concerning the entire incident is exceedingly dubious, only an 'unreasonable view of the evidence' would give credence to the defendant's version of [events] and require the submission of a lesser included crime."). Although Jennings fell backward, Henderson's evidence provides no rational explanation for the severe injury to the front and top of his head, nor does the contention that a car fell on his head during the few minutes before the arrival of the ambulance. There is no reasonable probability that had the jury considered the lesser-included offense of second-degree reckless injury it would have opted for conviction of that offense rather than first-degree reckless injury. Accordingly, Henderson was not prejudiced by his trial lawyer's failure to request the lesser-included offense of second-degree reckless injury.

*By the Court.*—Judgment and order affirmed.

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