STATE OF WISCONSIN

IN SUPREME COURT

No. 2019AP1046-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

THEOPHILOUS RUFFIN,

Defendant-Appellant.

PETITION FOR REVIEW

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STATEMENT OF THE ISSUE

Theophilous Ruffin had a fight with his pregnant girlfriend, during which he punched her in the head, threw her on the bed, and then reached into her vagina and partially ripped out her labia, leaving it hanging from her body. He was convicted of second-degree sexual assault by sexual intercourse causing injury. The court of appeals remanded, saying Ruffin was entitled to a *Machner*[1] hearing because trial counsel did not argue self-defense.

Issue: Was Ruffin entitled to an evidentiary hearing based on his postconviction allegation that his trial counsel was deficient for not pursuing a theory of self-defense?

Answered by the circuit court:	No.
Answered by the court of appeals:	Yes.
This Court should answer:	No.

INTRODUCTION

Ruffin got in an argument with his pregnant girlfriend about who should feed their crying baby. During the argument, Ruffin punched her in the head, threw her on the bed, pinned her there and then took his right hand, "shove[d]" it into her vagina, and "rip[ped] and pull[ed] [it] out." (R. 70:8–9.) The victim had blood gushing down her legs and when she went to the bathroom, she noticed that a piece of her vagina was hanging off her body. She was hospitalized and required two-and-a-half inches worth of running sutures to re-attach the hanging tissue.

The State charged Ruffin with second-degree sexual assault by sexual intercourse causing injury and mayhem. While Ruffin conceded he caused the injury, he insisted it was

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

an accident; he claimed he had just been trying to extricate himself from his girlfriend's grip when he grabbed her vagina. He claimed he put his hand between her legs to brace himself in a purported attempted to protect their unborn child. Trial counsel originally suggested a self-defense instruction, but withdrew it after the close of evidence, telling the court it didn't "fit," and instead sought a mistake instruction, which was denied.

After a jury convicted him of second-degree sexual assault and the circuit court denied his postconviction motion, Ruffin appealed, raising a host of issues. The court of appeals affirmed on all issues except one; it remanded for a *Machner* hearing as to whether Ruffin's trial counsel was deficient for not pursuing a self-defense claim. *State v. Ruffin*, No. 2019AP1046-CR, 2021 WL 870593 (Wis. Ct. App. Mar. 9, 2021.)[2] Judge White dissented on the self-defense issue, concluding: "There is no view of the evidence under which the jury could have found Ruffin's use of force was reasonably made in self-defense, and there is no reasonable probability that the jury would have returned a different verdict had it been instructed on self-defense."

The State seeks review for two reasons.

First, the State asks this Court to clarify the law and hold that a defendant is not entitled to a *Machner* hearing on a claim that counsel was deficient for not arguing self-defense when the claim is objectively unreasonable, such that no reasonable jury could have accepted it. Second, and alternatively, the State asks this Court to use its discretionary power of review to correct the manifest injustice inherent in the court of appeals' decision.

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[2] The court of appeals' opinion is contained in the appendix to this Petition at Pet-App. 101–26. However, the State will cite to the decision utilizing the Westlaw citation and paragraph number.

STATEMENT OF CRITERIA FOR GRANTING REVIEW

Wisconsin Stat. § (Rule) 809.62(1r) provides that review by this Court "is a matter of judicial discretion, not of right, and will be granted only when special and important reasons are presented," such as the enumerated bases set forth in the statute. However, the statutory criteria are "neither controlling nor fully measuring the court's discretion." Wis. Stat. § (Rule) 809.62(1r). As stated, review in this case is proper for two reasons.

First, the court of appeals' decision conflicts with established law from this Court that holds that a circuit court has the discretion to deny a request for a *Machner* hearing "if the record conclusively demonstrates that the defendant is not entitled to relief." *State v. Ortiz-Mondragon*, 2015 WI 73, ¶ 58, 364 Wis. 2d 1, 866 N.W.2d 717 (quoting *State v. Roberson*, 2006 WI 80, ¶ 43, 292 Wis. 2d 280, 717 N.W.2d 111).

Here, the circuit court concluded that the record as a whole conclusively established that no reasonable jury could have found that Ruffin acted in self-defense and therefore he was not entitled to a *Machner* hearing. The majority of the court of appeals did not address this ruling and instead simply concluded that Ruffin alleged sufficient facts in his post-judgment motion to entitle him to a *Machner* hearing. *Ruffin*, 2021 WL 870593, ¶ 42. But the whole point of the "conclusively demonstrates" standard is that it applies *even if* the defendant has alleged facts that would otherwise entitle him to a hearing. That is, a defendant is not automatically entitled to a *Machner* hearing when he alleges facts that are conclusively disproven by the record. The court of appeals also failed to adhere to its duty to "search the record for reasons to sustain the circuit court's exercise of discretion." *State v. Dobbs*, 2020 WI 64, ¶ 48, 392 Wis. 2d 505, 945 N.W.2d 609 (citation omitted).

Here, the trial record conclusively demonstrates that Ruffin had no viable self-defense claim. Regardless of whatever his intent was when sticking out his arm to brace himself, he has not alleged any facts that would justify reaching into his girlfriend's vagina, grabbing, and tearing off her labia. As Judge White's dissent correctly observed, Ruffin's mere assertion that he disfigured his girlfriend in self-defense is not enough to establish a viable self-defense theory because no reasonable jury could have concluded he acted in self-defense given the nature of the injury he inflicted.

Second, and relatedly, the facts in this case cry out for this Court to exercise its discretionary power of error correction. While the State is cognizant that this Court generally does not accept cases for purposes of error correction, *State v. Gajewski*, 2009 WI 22, 316 Wis. 2d 1, 762 N.W.2d 104, the facts of this case are so heinous, and the court of appeals' decision is so untenable that this case presents "special and important reasons" to take review. Wis. Stat. § (Rule) 809.62(1r).

STATEMENT OF THE CASE

Complaint

Ruffin was charged with second-degree sexual assault, domestic abuse through sexual intercourse, contrary to Wis. Stat. § 940.225(2)(b) and mayhem, domestic abuse, with the intent to disfigure, contrary to Wis. Stat. § 940.21. (R. 1.)

Trial testimony

In November 2015, Delia[3] and Ruffin were in a romantic relationship, living together in Milwaukee with their six-month-old son while Delia was pregnant with their second

[3] To comply with Wis. Stat. § (Rule) 809.86(4), the State uses a pseudonym instead of the victim's name.

child. (R. 69:105–08.) Both Delia and Ruffin had children from previous relationships who also lived with them. (R. 69:109–11.)

According to Delia's trial testimony, on November 29, 2015, she had a few beers with Ruffin and snorted a couple lines of cocaine. (R. 69:108–15.) Ruffin went to bed around 10:00 or 11:00 p.m. that night. (R. 69:116–17.) Delia stayed up later, not going to sleep until around 3:00 a.m. the next morning. (R. 69:117.) Delia woke up to Ruffin kicking her, telling her that her baby was crying. (R. 69:117.) Delia replied that the baby was teething and had an ear infection. (R. 69:118–19.) She implied that Ruffin should feed his son a bottle. (R. 69:119.) Ruffin replied that he was "so sick and tired of [her] stiff neck monkey ass." (R. 69:119.)

The argument then became physical. (R. 69:125–26.) Ruffin pulled Delia by the hair, hit her, and punched her in the back of the head. (R. 69:125–26.) Delia hit Ruffin twice with her hand. (R. 69:126.) The fight then stopped, and Ruffin told Delia that she did not have to leave, suggesting that she could "just sleep in the other room." (R. 69:127.) But Delia insisted on leaving. (R. 69:127–28.)

Delia tried to get past Ruffin, when he grabbed her by her hair and inner thigh, picked her up and threw her on the bed. (R. 69:128.) She landed on her back, with Ruffin on top of her, kneeling on the bed. (R. 69:128–30.) Ruffin used his left arm to pin her to the bed. (R. 70:7–8.) He then took his right hand, "shove[d]" it into her vagina, and "rip[ped] and pull[ed] [it] out." (R. 70:8–9.) Delia said she "felt all this pressure. And then instantly [she] felt wet." (R. 70:9.) Delia thought that he was trying to kill the baby. (R. 70:11–12.) Ruffin jumped off her, and she ran downstairs to the bathroom where she saw that blood was dripping down her legs. (R. 70: 9, 14.) She then noticed that a piece of her vagina was hanging from her body. (R. 70:14–15.)

Shortly thereafter, Delia's mother arrived at the home. (R. 70:16–17; 72:70.) Her mother noticed that Delia's legs were covered in blood and she thought Delia was having a miscarriage. (R. 70:19; 72:70–71.) Her mother asked Ruffin what he had done to Delia. (R. 72:72–73.) Ruffin said, "I went just like this," and made a "bladed" motion with his hand. (R. 72:73.) Ruffin said that he was just trying to "poke her." (R. 70:18–20; 72:74.) Delia's mother then took her to the hospital. (R. 70:21.) As Delia and her mother drove off, the police arrived. (R. 70:22.) But Delia told her mother that she did not want her to stop because she was bleeding. (R. 70:22.) Once at the hospital, Delia told the medical staff that she had fallen down the stairs. (R. 70:22; 71:84–85.)

Delia had surgery to repair and reattach two-and-a-half inches of separated vaginal tissue, part of which was devitalized. (R. 71:83.) On December 2, Delia returned to the hospital, fearing that she had torn her stitches. (R. 70:38–39; 72:79.) While at the hospital, Delia reported the assault to Milwaukee Police Officer Brendan Dolan. (R. 72:4–12.)

Shortly thereafter, the State charged Ruffin as set forth above. (R. 68–74.)

At trial, in addition to testimony from Delia and her mother, the jury heard from Dr. Carol Hasenyager, a gynecologic surgeon with whom the emergency room staff consulted on how to treat Delia's injury. (R. 71:73–75.) Hasenyager—who had 36 years' experience at the time of trial—testified that she "had never seen anything quite like" Delia's injury, calling it "horrible." (R. 71:73–75.)

Dolan testified, as well. (R. 72:4.) He described Delia's injury as "genital mutilation," saying that he had "never seen anything like that." (R. 72:17–18.) He also said that when he confronted Ruffin with Delia's accusation, Ruffin admitted that he had grabbed Delia's vagina, but he claimed that he did so in an effort to get Delia off of him. (R. 72:19.) When

Dolan expressed disbelief that Ruffin—approximately twice as heavy as Delia and one foot taller—would need to grab Delia's vagina to free himself from her grip, Ruffin accepted responsibility for her injury and conceded that he had made a mistake. (R. 72:24.)

Ruffin also testified. (R. 73:4.) According to Ruffin, on the day of the assault, he woke to Delia "fussing" and "cussing" at him. (R. 73:7.) He said that three of his beers and his cocaine were missing. (R. 73:7–8.) Ruffin said that he and Delia "exchanged words," and he "threatened to call the social workers." (R. 73:8.) Delia then started to hit him, punch him, and tried to push him down the stairs. (R. 73:8.) Ruffin then tried to push Delia onto the bed, but she tripped, grabbed him by the collar, and they both fell on the bed. (R. 73:9.) In an effort to avoid falling on Delia and their fetus, Ruffin tried to hold himself off of her by putting out his arm. (R. 73:9–11.) He denied hitting Delia or calling her names. (R. 73:9, 16.) Ruffin said he was on top of Delia and her legs were around his waist. (R. 73:45.)

Ruffin provided no explanation for how his hand got into her vagina and why or how he tore off tissue in that area other than saying he was "pushing in that area" to "push her legs off of me so I [could] go." (R. 73:44–45.) He asserted that he "wasn't trying to use no forces" and that he touched her "gently." (R. 73:54–55.)

Jury instructions and verdict.

After the close of evidence, Ruffin's counsel, Attorney Givens, asked the court for an instruction on self-defense and defense of others. (R. 73:62.) The court asked Givens the basis for the instruction and he asserted the injuries were a result of "defensive actions." (R. 73:63.) However, after reading through the self-defense instruction during a break, Givens withdrew his request, stating: "I'm not sure it really fits this situation." (R. 73:64.) Instead, he asked the court instead to

give the jury the accident instruction on both charges. (R. 73:65.) The court refused to give the accident instruction on second-degree sexual assault by sexual intercourse, because the crime does not require the State prove a mental element, but agreed to give the accident instruction for mayhem. (R. 73:69–77.)

The court then instructed the jury. (R. 73:80–91.) Although Ruffin had been charged with second-degree sexual assault by sexual intercourse *causing injury*, and the court told the jury that this was the charge Ruffin faced, it erroneously instructed the jury on the elements of second-degree sexual assault by sexual intercourse *by use or threat of force*. (R. 73:81–83.) The jury found Ruffin guilty of second-degree sexual assault "as charged in Count One of the information," which is the crime of causing injury. (R. 4; 21.) It found him "not guilty of mayhem." (R. 74:3.)

Sometime after the verdicts and before sentencing, Ruffin's counsel discovered the error in the jury instruction and brought it to the court and the State's attention. (R. 25; 75:2.) The court took "full responsibility for th[e] error" and heard from the parties on how to address it. (R. 76:6.) Relying largely on *State v. Williams*, 2015 WI 75, 364 Wis. 2d 126, 867 N.W.2d 736, the State argued that the court should uphold the verdict because the error was harmless. (R. 25:2.) Ruffin argued that the court should instead enter a judgment of conviction for third-degree sexual assault, believing that this was necessary in light of the jury's acquittal on the mayhem charge. (R. 76:10–13.)

The court agreed with the State. (R. 76:15–19.) Because there had been no dispute that Ruffin caused Delia's injury, the error was harmless. (R. 76:17–19.) The court sentenced Ruffin to eight years' initial confinement and four years' extended supervision. (R. 32.)

Postconviction motion

Ruffin moved for postconviction relief, arguing that the court erred in instructing the jury on the wrong subsection of sexual assault and in denying him an accident instruction. (R. 49.) He also argued that trial counsel was ineffective for not objecting to the submission of the wrong instruction, for failing to "properly present" an argument on the application of the accident defense instruction, and for failing to pursue the self-defense instruction. (R. 49.) In addition, he asked the court to grant him a new trial in the interest of justice. (R. 49.)

The court denied the motion without a hearing. (R. 50.) Relating to the issue raised in this Petition, the circuit court found that counsel "was not ineffective for failing to renew his request for a self-defense instruction based on the facts of this case." (R. 50:4.) Further, the circuit court ruled that even if a self-defense instruction would have been given, there was not a reasonable probability that the jury would have found in Ruffin's favor, "based on the amount of force that was used." (R. 50:4.) The court elaborated: "Almost entirely ripping off the woman's labia - she testified it was just hanging there—that required 28 stitches to reattach it? When she was laying on the bed face up? There is not a reasonable probability he would have obtained an acquittal." (R. 50:4.)

Court of appeals' opinion

Ruffin appealed his judgment of conviction and the order denying his motion for postconviction relief. (R. 55.) In an unpublished opinion, the court of appeals affirmed in part and reversed in part. The court of appeals affirmed the circuit court's denial of Ruffin's postconviction motion on all grounds except for his claim of ineffective assistance of trial counsel relating to withdrawing his request for a self-defense instruction. *Ruffin*, 2021 WL 870593, ¶¶ 1–2. On that issue, the court reversed and remanded for a *Machner* hearing. *Id.* ¶ 2.

The court of appeals concluded that Ruffin alleged sufficient facts in his postconviction motion for a *Machner* hearing. *Id.* ¶ 42. Specifically, Ruffin "alleged that [Delia] was attacking him and his decision to push on what he thought were [Delia's] legs was a reasonable action, given that he did not want to put his weight on [Delia] and possibly harm [Delia] and their unborn child." *Id.* ¶ 45. Ruffin further claimed that his "entire defense centered on his actions being taken in self-defense and accidentally causing [Delia]'s injury." *Id.* ¶ 46. According to Ruffin, he was prejudiced because "the jury never had the chance to consider his only defense when there was sufficient evidence introduced at trial to support the instruction." *Id.*

Based on these allegations, the court of appeals concluded that "Ruffin's motion entitles him to an evidentiary hearing on whether trial counsel was ineffective in withdrawing his request for a self-defense instruction." *Id.* ¶ 47. In a footnote, the court of appeals said that on remand, the circuit court would need to address whether trial counsel was required to argue self-defense because Ruffin's stated "objective" was self-defense. *Id.* ¶ 45 n.12.[4]

Dissent

Judge White dissented regarding the self-defense issue. Although Judge White "question[ed] whether Ruffin overcame the low bar of 'some evidence,'" she concluded that any error by counsel was harmless.[5] *Ruffin*, 2021 WL 870593,

[4] This issue was not addressed in the circuit court's postconviction ruling and no fact-finding occurred relating to it; therefore; the State did not address this issue in its brief before the court of appeals. *Ruffin*, 2021 WL 870593, ¶ 45 n.12.

[5] Judge White also disagreed with the majority's conclusion that *McCoy* needed to be addressed on remand, concluding that there was no evidence that trial counsel refused to follow Ruffin's instructions or that he objected to counsel's actions at trial. (Pet-App. 123, ¶ 48 n.1) (White, J., dissenting).

¶ 49 (White, J., dissenting). Judge White concluded that any error by counsel was harmless because there was insufficient evidence from which a jury could find that Ruffin acted in self-defense. *Id.* ¶¶ 49–50. Judge White noted that there was no evidence that Ruffin had tried non-physical means to stop the argument with his girlfriend. *Id.* ¶ 50. "Under any view of the facts, the force Ruffin used was not proportionate to the manner of threat he encountered. I do not believe any jury would conclude that Ruffin's testimony showed he believed his actions that caused [Dalia]'s injury were necessary for his self-defense." *Id.*

Calling Ruffin's theory "antithetical to Wisconsin law on self-defense," *id.* ¶ 51, Judge White said it "defies common sense that during a physical altercation between a pregnant woman and a man nearly a foot taller and more than one hundred pounds heavier than she, that there was a reasonable basis for Ruffin's use of force." *Id.* ¶ 52. Judge White noted that while Ruffin alleged he did not mean to hurt his girlfriend when he put his arm out to brace his fall, "Ruffin's testimony does not reflect a similar intention when he pushed [Dalia] in the vaginal area or that pushing her was necessary to stop her interference." *Id.* ¶ 51.

Judge White concluded: "There is no view of the evidence under which the jury could have found Ruffin's use of force was reasonably made in self-defense, and there is no reasonable probability that the jury would have returned a different verdict had it been instructed on self-defense." *Id.* ¶ 53. Therefore, because the record conclusively established that Ruffin was not prejudiced by his attorney's failure to pursue self-defense, Judge White concluded that the circuit court properly exercised its discretion when it denied Ruffin's motion without a hearing. *Id.*

ARGUMENT

I. The court of appeals' decision is inconsistent with established law governing *Machner* hearings.

A. The court of appeals erroneously considered only Ruffin's post-judgment allegations and did not examine the trial record as a whole.

The law is well-established that "[w]hen a circuit court summarily denies a postconviction motion alleging ineffective assistance of counsel without holding a *Machner* hearing, the issue for the court of appeals is whether the defendant's motion alleged sufficient facts entitling him to a hearing." *State v. Sholar,* 2018 WI 53, ¶ 51, 381 Wis. 2d 560, 912 N.W.2d 89. The law is equally clear that a defendant is not entitled to a *Machner* hearing simply because he makes conclusory allegations in a posttrial motion, "no matter how cursory or meritless the ineffective assistance of counsel claim might be." *State v. Curtis*, 218 Wis. 2d 550, 555 n.3, 582 N.W.2d 409 (Ct. App. 1998).

Accordingly, a "circuit court has the discretion to deny the postconviction motion without a *Machner* hearing 'if the motion fails to allege sufficient facts to raise a question of fact, presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief.'" *Ortiz-Mondragon*, 364 Wis. 2d 1, ¶ 58 (quoting *Roberson,* 292 Wis. 2d 280, ¶ 43). And when reviewing such a decision, an appellate court is obligated to "search the record for reasons to sustain the circuit court's exercise of discretion." *Dobbs*, 392 Wis. 2d 505, ¶ 48 (citation omitted).

In order to make out a prima facie case of ineffective assistance of counsel, a defendant must allege facts that establish that counsel was both deficient and that the deficiency was prejudicial under the familiar two-part test

articulated in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). "In determining whether counsel's performance was deficient for failing to bring a motion, [a court] may assess the merits of that motion." *State v. Sanders*, 2018 WI 51, ¶ 29, 381 Wis. 2d 522, 912 N.W.2d 16. And "[c]ounsel does not perform deficiently by failing to bring a meritless motion." *Id.* Indeed, an attorney's failure to raise a meritless argument is neither deficient performance nor prejudicial under *Strickland*. *State v. Ziebart*, 2003 WI App 258, ¶ 14, 268 Wis. 2d 468, 673 N.W.2d 369.

Here, Ruffin's post-conviction motion alleged that he was entitled to an instruction on self-defense because he testified that his girlfriend "attacked him, [and was] jumping on him and knocking him on the bed." (R. 49:2.) According to Ruffin "[i]n an effort to get her off of him and to not put pressure on her stomach, he testified that he grabbed her by the shoulder and the vaginal area to lift her up and push her off of him." (R. 49:2.) "When he did this, he testified that [Delia] yelled in pain and the altercation ceased." (R. 49:2.)

However, despite what was alleged in his motion, Ruffin actually testified at trial that *he* was on top of her with her legs wrapped around him. (R. 73:45.) He testified that he was "pushing in that area" to "push her legs off of me so I [could] go." (R. 73:44–45.)

The circuit court concluded that trial counsel's decision to not pursue a self-defense instruction (even assuming one could have been given) was not prejudicial because there was not a reasonable probability of an acquittal: "Almost entirely ripping off the woman's labia - she testified it was just hanging there—that required 28 stitches to reattach it? When she was laying on the bed face up? There is not a reasonable probability he would have obtained an acquittal." (R. 50:4 (footnote omitted).) The circuit court reviewed the entire

record, correctly applied the law, and reached the correct result.

In contrast, the court of appeals looked solely at what was alleged in Ruffin's motion. *Ruffin*, 2021 WL 870593, ¶ 42. The court of appeals concluded that Ruffin alleged sufficient facts to be entitled to a hearing because he alleged that he did not intend to hurt Dalia, was trying to avoid putting pressure on her stomach, and that he reasonably pushed on her legs to extricate himself. *Id.* ¶¶ 45–47. The majority of the court of appeals agreed with Ruffin that he alleged sufficient facts to show "there could have been no strategic reason for his trial counsel to withdraw a request for a self-defense instruction." *Id.*¶ 45. Further, the majority of the court of appeals said that because Ruffin alleged that his theory of the case all along was self-defense, counsel's failure to pursue the instruction entitled him to a hearing on whether he suffered actual prejudice. *Id.*

But this analysis is fundamentally flawed. As Judge White's dissent points out, Ruffin's allegations were insufficient to establish either that he was entitled to a self-defense instruction or that the failure to request one was prejudicial. *Id.* ¶ 49 (White, J., dissenting).

B. Ruffin was not entitled to an instruction on self-defense.

Judge White stated that she "question[ed] whether Ruffin overcame the low bar of 'some evidence' to be entitled to request the self-defense jury instruction." *Id.* The State agrees. While the "some evidence" standard for self-defense is indeed a low bar, it is not nonexistent.

Perfect self-defense has two elements: "(1) a reasonable belief in the existence of an *unlawful interference*; and (2) a reasonable belief that the amount of force the person intentionally used was *necessary* to prevent or terminate the

interference." *State v. Head*, 2002 WI 99, ¶ 84, 255 Wis. 23d 194, 648 N.W.2d 413 (emphasis added). A defendant who seeks a jury instruction on perfect self-defense must meet "a reasonable objective threshold" as to both elements. *Id.* A self-defense instruction cannot be based on mere conjecture. *Ross v. State,* 61 Wis. 2d 160, 172, 211 N.W.2d 827 (1973).

Here, even assuming Ruffin's testimony was sufficient to create an issue of fact as to whether he believed Dalia was unlawfully interfering with him, there is absolutely no evidence to justify the amount of force used (tearing off her labia) given the nature of the interference (her legs around him). As Judge White explained, while Ruffin said his intention in holding out his arm was self-defense, "Ruffin's testimony does not reflect a similar intention when he pushed [Dalia] in the vaginal area or that pushing her was necessary to stop her interference." *Ruffin*, 2021 WL 870593, ¶ 51 (White, J. Dissenting).

The State fully agrees that "[i]t defies common sense that during a physical altercation between a pregnant woman and a man nearly a foot taller and more than one hundred pounds heavier than she, that there was a reasonable basis for Ruffin's use of force." *Id.* ¶ 52. Again, Dalia testified that Ruffin used his left arm to pin her to the bed. (R. 70:7–8.) He then took his right hand, "shove[d]" it into her vagina, and "rip[ped] and pull[ed] [it] out." (R. 70:8–9.) Nowhere in Ruffin's testimony is there any asserted justification for shoving his hand in his girlfriend's vagina and detaching two-and-a-half inches of tissue. Attorney Givens was correct that in light of the trial testimony, self-defense did not "fit," (R. 73:64), because there was no justification for the amount of force used. As Judge White said, "there is insufficient evidence that Ruffin acted in self-defense." *Ruffin*, 2021 WL 870593, ¶ 50 (White, J. Dissenting).

C. The trial record conclusively disproves prejudice.

Moreover, even if the majority of the court of appeals was correct that Ruffin's testimony at trial was sufficient to entitle him to a jury instruction on self-defense, the record conclusively disproves prejudice. As both the circuit court and Judge White observed, no reasonable jury could have believed that Ruffin acted in self-defense utilizing a reasonable amount of force under the circumstances.

The circuit court explained: "Almost entirely ripping off the woman's labia - she testified it was just hanging there—that required 28 stitches to reattach it? When she was laying on the bed face up? There is not a reasonable probability he would have obtained an acquittal." (R. 50:4.) And Judge White elaborated further that there is nothing to establish that Ruffin tried non-violent means of ending the fight: "Under any view of the facts, the force Ruffin used was not proportionate to the manner of threat he encountered." *Ruffin*, 2021 WL 870593, ¶ 50 (White, J. Dissenting).

The State agrees that "[t]here is no view of the evidence under which the jury could have found Ruffin's use of force was reasonably made in self-defense, and there is no reasonable probability that the jury would have returned a different verdict had it been instructed on self-defense." *Id.* ¶ 53. No reasonable jury would believe Ruffin's claim that he acted "gently" and "wasn't trying to use no forces" (R. 73:55), when he ripped off two and a half inches of Dalia's labia.

* * * *

For all of these reasons, the record conclusively demonstrates that Ruffin was not entitled to relief. The court of appeals' decision is inconsistent with established law because it looked only to Ruffin's post-judgment allegations without examining the record as a whole and without

considering whether his assertions were objectively reasonable.

II. The facts of this case are so extreme as to warrant discretionary error correction.

Even if this Court disagrees with the State that review is necessary to clarify and reaffirm that a *Machner* hearing is not required when the record conclusively demonstrates a defendant is not entitled to relief, it should nonetheless exercise its power of discretionary review to correct the court of appeals' erroneous application of the law.

This is not a case like *Gajewski*, 316 Wis. 2d 1, ¶ 10 that involves a "morass" of factual disputes and credibility determinations. There is no dispute that during the argument, Ruffin inserted his hand onto Dalia's vagina and caused her injury. He admitted this to police. (R. 72:19.) Ruffin admitted to police that he placed his hand on Dalia's vagina and pushed to get himself away. (R. 72:24.) He further admitted that he was "responsible for" her injury. (R. 72:24.) He made the same admission at trial. (R. 73:54.)

Ruffin's assertion that he acted "gently" and "wasn't trying to use no forces" flies in the face of the undisputed evidence that Dalia's labia was hanging off her body (R. 70:14–15) and required two-and-a-half inches worth of running sutures to reattach it. (R. 71:83.)

The discussion in Section I adequately demonstrates that the court of appeals' decision on the self-defense issue was legally incorrect. Moreover, the suggestion that Ruffin's trial counsel could have been deficient for not pursuing self-defense under these circumstances is absurd.[6] The idea that

[6] Because the issue of whether *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018), *required* trial counsel to assert an objectively unreasonable defense was not directly addressed by the court of

it is even possible that a jury would have found that the amount of force he used on Dalia was reasonable and necessary is equally absurd.

The court of appeals' decision on these points demands error correction.

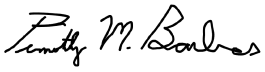
CONCLUSION

This Court should grant the petition for review.

Dated this 8th day of April 2021.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin



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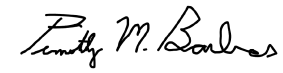
appeals, the State does not raise it as an independent basis for review. *See Ruffin*, 2021 WL 870593, ¶ 45 n.12. But it defies all manner of logic for the court of appeals to suggest that trial counsel may have been constitutionally required to assert a meritless defense.

CERTIFICATION

I hereby certify that this petition conforms to the rules contained in Wis. Stat. § 809.62(4) for a petition for review produced with a proportional serif font. The length of this petition is 5,332 words.

Dated this 8th day of April 2021.



TIMOTHY M. BARBER
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.62(4)(b)

I hereby certify that:

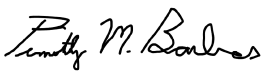
I have submitted an electronic copy of this petition for review, excluding the appendix, if any, which complies with the requirements of Wis. Stat. §§ (Rules) 809.62(4)(b) and 809.19(12).

I further certify that:

This electronic petition for review is identical in content and format to the printed form of the petition for review filed as of this date.

A copy of this certificate has been served with the paper copies of this petition for review filed with the court and served on all opposing parties.

Dated this 8th day of April 2021.



TIMOTHY M. BARBER
Assistant Attorney General

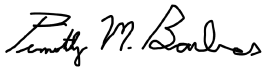
Index to the Appendix
State of Wisconsin v. Theophilous Ruffin
Case No. 2019AP1046-CR

APPENDIX CERTIFICATION

I hereby certify that filed with this petition for review, either as a separate document or as a part of this petition, is an appendix that complies with Wis. Stat. § 809.62(2)(f) and that contains, at a minimum: (1) a table of contents; (2) the decision and opinion of the court of appeals; (3) the findings or opinion of the circuit court necessary for an understanding of the petition; and (4) portions of the record necessary for an understanding of the petition.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 8th day of April 2021.



TIMOTHY M. BARBER
Assistant Attorney General

CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (RULE) 809.62(4)(b)

I hereby certify that:

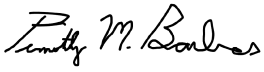
I have submitted an electronic copy of this appendix, which complies with the requirements of Wis. Stat. §§ (Rules) 809.62(4)(b) and 809.19(13).

I further certify that:

This electronic appendix is identical in content to the printed form of the appendix filed as of this date.

A copy of this certificate has been served with the paper copies of this appendix filed with the court and served on all opposing parties.

Dated this 8th day of April 2021.



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