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

**May 8, 2018**

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



**Appeal No. 2017AP935** **Cir. Ct. No. 2004CF2483**

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

**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**DARRYL ALLEN FLYNN,**

**DEFENDANT-APPELLANT.**

APPEAL from an order of the circuit court for Milwaukee County: M. JOSEPH DONALD, Judge. *Affirmed*.

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



¶1 PER CURIAM. Darryl Allen Flynn, *pro se*, appeals an order denying his motion for postconviction relief. Flynn argues that his trial lawyer

ineffectively represented him by failing to object to jury instructions that: (1) did not inform the jury of the State's burden to disprove self-defense beyond a reasonable doubt for first-degree and second-degree reckless homicide; (2) did not inform the jury that, with regard to self-defense, a belief could be reasonable, even though it is mistaken; (3) did not properly inform the jury to consider the law of self-defense of others with each offense; and (4) did not inform the jury that Flynn had a right to protect his children. Flynn further argues we should exercise our discretionary power to grant him a new trial in the interests of justice under WIS. STAT. § 752.35 (2015-16).[1] We affirm.

¶2 The circuit court's written decision properly analyzes and disposes of Flynn's argument that he received ineffective assistance of trial counsel. Therefore, we affirm as to that issue for the reasons explained in the circuit court's decision, which is attached. *See* WIS. CT. APP. IOP VI. (5)(a) (Nov. 30, 2009) ("When the trial court's decision was based upon a written opinion … the panel may … make reference thereto, and affirm on the basis of that opinion.").

¶3 Flynn also argues that we should exercise our discretionary power to grant him a new trial under WIS. STAT. § 752.35. That statute authorizes us to reverse a judgment and order a new trial "if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried." ***Id.*** Flynn contends that there are inherent due process violations in this case because the jury was not properly instructed. Flynn has not persuaded us that the alleged errors to which he points warrant a new trial.

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

*By the Court.*—Order affirmed.

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

STATE OF WISCONSIN | CIRCUIT COURT Branch 2 | MILWAUKEE COUNTY

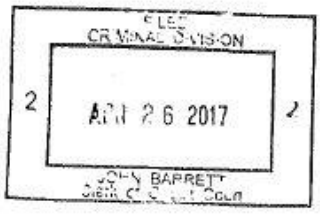
STATE OF WISCONSIN,

Plaintiff,

vs.

DARRYL A. FLYNN,

Defendant.




Case No. 04CF002483

**DECISION AND ORDER**
**DENYING MOTION FOR POSTCONVICTION RELIEF**

On April 17, 2017, the defendant filed a *pro se* motion for postconviction relief pursuant to section 974.06, Stats., based upon the ineffective assistance of trial counsel. The defendant was charged with first-degree reckless homicide, use of a dangerous weapon. He was tried before a jury on an amended charge of first-degree intentional homicide, use of a dangerous weapon. At the close of evidence, the court instructed the jury on first and second-degree intentional homicide and first and second-degree reckless homicide. The jury convicted the defendant of first-degree reckless homicide while armed. The judgment of conviction was affirmed on appeal. In 2010, the defendant filed a postconviction motion under section 974.06, Stats., based on claims of newly-discovered evidence and ineffective assistance of postconviction/appellate counsel. The court denied the motion following an evidentiary hearing, and on December 11, 2012, the Court of Appeals affirmed the postconviction order.

The defendant's current motion raises new claims of error regarding the jury instructions. Specifically, he alleges (1) the court did not correctly inform the jury of the State's burden to disprove self-defense beyond a reasonable doubt for first and second-degree reckless homicide; (2) the court did not inform the jury that a belief could be reasonable though mistaken in regards to self-defense; (3) the court did not correctly inform the jury how to consider the law of defense of others with each offense; and (4) the court did not inform the jury that he had the right to protect his children. He further argues that trial counsel was ineffective for failing to raise his

claims of error in the jury instructions and for sharing an opinion with the court and the prosecutor prior to sentencing that he was guilty.

***State v. Escalona-Naranjo***, 185 Wis. 2d 169, 178 (1994) precludes the defendant from pursuing the current motion. ***Escalona-Naranjo***, as it interprets section 974.06(4), Stats., requires a defendant to raise all grounds for postconviction relief in his original motion or appeal. Failure to do so precludes a defendant from raising additional issues, including claims of constitutional or jurisdictional violations, in a subsequent motion or appeal where those issues could have been raised previously. The defendant could have raised his current claims during his direct appeal or in his prior motion for postconviction relief under section 974.06, Stats. The court is not persuaded that ***State v. Austin***, 349 Wis. 2d 744 ((Ct. App. 2013) provides him a sufficient reason for failing to do so merely because it was decided after his prior appeal concluded in 2012. First, ***Austin*** relates only to the defendant's first claim of error in the jury instructions.[1] In ***Austin***, the Court of Appeals held that the trial court's error in failing to instruct the jury on the State's burden of proof on self-defense and defense of others with respect to charges against the defendant for first-degree recklessly endangering safety and second-degree recklessly endangering safety required reversal of the defendant's convictions in the interests of justice, in that the trial court failed to provide the jury with a proper framework for analyzing the defendant's claims of self-defense and defense of others. The decision resulted in changes to the language of WI JI-Criminal 801 and 1017.[2] Relying on ***Austin***, the defendant argues that the trial court failed to properly instruct the jury in his case on the State's burden of disproving self-defense on the reckless homicide charges. He alleges that he could not have foreseen the decision in ***Austin***, which provides him with a sufficient reason for not raising the jury instruction issue earlier. At the same time; however, the defendant does not excuse trial counsel's failure to raise this issue:

> Accordingly, failing to insist on a correct burden could not have been a reasonable trial strategy. Furthermore, any claim that counsel could not have objected to the instructional flaw at the jury instruction conference with particularity prior to the **Austin** decision is frivolous because the **Austin** decision was clearly foreshadowed by **State v. Schulz, 102 Wis. 2d 423, 429-30 (1981)** and **State v. Pettit, 171 Wis. 2d 627, 640 (1992)**. Both cases place the burden to disprove a negative defense beyond a reasonable doubt on the State whether the crime is intentional or reckless,

[1] Consequently, the defendant's other claims of ineffective assistance of trial counsel relating to counsel's failure to object to other alleged errors in the jury instructions and counsel's communication with the prosecutor and the court prior to sentencing are plainly barred under *Escalona-Naranjo*.

[2] Among the changes, language was added to the instructions to make clear that the burden is on the State to prove beyond a reasonable doubt that the defendant did not act lawfully in self-defense.

> so counsel had an obligation to object, and his failure to do so constitutes ineffective assistance of counsel. This is one of those rare cases mentioned in **Nichols v. United States, 501 F. 3d 542 (2007).**

(Defendant's motion at p. 8). (Citations omitted). (Emphasis in original). In other words, the defendant alleges that trial counsel was ineffective for failing to object to the jury instructions *based on law which was then in existence*. The ***Austin*** decision relied on both ***Schulz*** and ***Pettit*** for its statements about the State's burden of proof when self-defense is at issue. Both cases squarely place the burden on the State to prove beyond a reasonable doubt that the defendant's conduct did not negate an element of the offense. If counsel could have raised this issue previously, so could have the defendant. The court recognizes that the defendant may not have identified this issue until ***Austin*** was decided, but the mere fact that a favorable case was decided on an issue that could have been raised previously under then existing law does not provide the defendant with a sufficient reason for failing to do so. ***Austin*** did not announce a new rule on the burden of proof for self-defense claims. The sole focus of the decision was the jury instructions, which the court found did not properly state the law of self-defense. The defendant could have raised this same argument without the benefit of the ***Austin*** decision, and therefore, the court finds that ***Escalona-Naranjo*** bars his current challenge to the jury instructions.

**THEREFORE, IT IS HEREBY ORDERED** that the defendant's motion for postconviction relief is **DENIED.**

Dated this 26 day of April 2017 at Milwaukee, Wisconsin.

**BY THE COURT:**

**M. Joseph Donald**
**Circuit Court Judge**