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

**May 8, 2018**

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



**Appeal No. 2017AP1206-CR** **Cir. Ct. No. 2015CF3109**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**EMMANUEL EARL TRAMMELL,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed*.

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

¶1 PER CURIAM. Emmanuel Earl Trammell appeals from a judgment, entered upon a jury's verdict, convicting him on one count of armed robbery and one count of operating a motor vehicle without the owner's consent. Trammell also appeals from an order that denied his postconviction motion without a hearing. Trammell contends that one of the jury instructions given reduced the State's burden of proof, confused the jury, and misstated the law. Trammell also asserts that the "improper" instruction warrants a new trial in the interest of justice because the real controversy was not fully tried, or that the instruction was plain error warranting relief. We reject these arguments and affirm the judgment and order.

## BACKGROUND

¶2 The facts underlying Trammell's convictions are largely undisputed. On July 8, 2015, T.R., Jr.,[1] parked his mother's car outside of a food store. T.R. went inside while his girlfriend, A.N., remained in the car. Trammell, whom T.R. knew, approached T.R. in the store and asked what was in his pockets. When T.R. replied that he had nothing, Trammell tried to grab his phone, but T.R. pushed Trammell's hand away. Trammell instead grabbed cash from T.R.'s hand.

¶3 Trammell and T.R. exited the store. Trammell asked T.R. whose car he was driving. T.R. said it was his mother's car. Two other individuals T.R. knew, Gabarie Silas-Handley (Silas) and "Reisco," were also outside. Silas asked

[1] The appellant's brief refers to the victim by his full name. We remind counsel that, under WIS. STAT. RULE 809.86(4) (2015-16), "the briefs of the parties shall not, without good cause, identify a victim by any part of his or her name[.]"

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

whose car T.R. was driving, and T.R. indicated it was his mother's car. Silas told Trammell not to take the car because it belonged to T.R.'s mother.

¶4 Trammell approached the driver's side of the car; T.R. followed him. Trammell pulled a gun and pointed it at T.R., telling him, "Just back off!" T.R. backed up and told A.N. to get out of the car. Trammell threw a set of keys at Silas. Silas and "Reisco" drove off in another vehicle, followed by Trammell in the car T.R. had been driving.

¶5 About an hour after it was taken, T.R.'s car was tracked via its OnStar system. Officers found and followed the car, which was ultimately remotely deactivated by OnStar. As the car slowed, the driver—Silas—and other occupants fled on foot, but they were apprehended. The car crashed into a tree.

¶6 T.R. and A.N., who herself had known Trammell since middle school, both identified Trammell from a photo array. Trammell was charged with armed robbery and operating a motor vehicle without the owner's consent. Silas, who was also charged in connection with this incident, testified against Trammell as part of a plea agreement. Trammell's defense to the armed robbery was that he did not intend to permanently deprive T.R. of the car.[2] Although Trammell did not testify in his own defense, Silas testified that he thought Trammell took the car as collateral for a loan. Silas also testified that he thought Trammell and T.R. were going to work something out and that, while Silas was being pursued by

[2] Armed robbery is committed by someone who, "with intent to steal, takes property from the person or presence of the owner … by use or threat of use of a dangerous weapon[.]" *See* WIS. STAT. § 943.32(2). "'Intent to steal' means that the defendant … intended to deprive the owner permanently of possession of the property." WIS JI—CRIMINAL 1480.

police, he was on the phone with T.R.'s "people," talking to them about returning the car.

¶7 In preparation for trial, the parties had a jury instruction conference. One of the instructions the trial court eventually gave to the jury was WIS JI—CRIMINAL 140 ("Instruction 140"), regarding the burden of proof and presumption of innocence. Trammell did not object to the instruction at the conference or when it was given. The jury convicted Trammell on both counts as charged. The trial court sentenced Trammell to twenty years' imprisonment for the armed robbery and a concurrent thirty months' imprisonment for the motor vehicle conviction.

¶8 Trammell filed a postconviction motion for a new trial, claiming the jury had been given faulty instructions that incorrectly instructed jurors on the State's burden of proof. Specifically, Trammell complained about the last two sentences of Instruction 140, which tell the jury, "While it is your duty to give the defendant the benefit of every reasonable doubt, you are not to search for doubt. You are to search for the truth." These sentences are sometimes referred to as the "dual directives."

¶9 Trammell cited two law review articles[3] that suggest use of the dual directives may mislead jurors into concluding they may convict a defendant even if they have reasonable doubt about his or her guilt, resulting in a "near-doubling" of conviction rates over jurors not given the dual directives. The trial court was not persuaded. It described the articles as "interesting reading," but noted that the

[3] *See* Michael D. Cicchini & Lawrence T. White, *Truth or Doubt? An Empirical Test of Criminal Jury Instructions*, 50 U. RICH. L. REV. 1139 (2016); Michael D. Cicchini & Lawrence T. White, *Testing the Impact of Criminal Jury Instructions on Verdicts: A Conceptual Replication*, 117 COLUM. L. REV. ONLINE 22 (2017).

Jury Instruction Committee had formulated and approved Instruction 140,[4] and the trial court considered itself bound by the instruction. Trammell appeals.

## DISCUSSION

### *I. Standards of Review*

¶10 On appeal, Trammell claims that Instruction 140 was improper because it reduced the State's burden of proof, confused the jury, and misstated the law, as demonstrated by the law review articles, thereby violating his due process rights. The trial court has broad discretion when instructing a jury. *See* ***State v. Neumann***, 179 Wis. 2d 687, 699, 508 N.W.2d 54 (Ct. App. 1993). Whether the instructions correctly state the law is a question of law this court reviews *de novo*. *See* ***id.*** Whether a jury instruction violates due process is also a question of law. *See* ***State v. Tomlinson***, 2002 WI 91, ¶53, 254 Wis. 2d 502, 648 N.W.2d 367. The State counters that Trammell has waived any challenge to the jury instruction,[5] and waiver is also question of law. *See* ***State v. Kelty***, 2006 WI 101, ¶13, 294 Wis. 2d 62, 716 N.W.2d 886.

[4] In December 2016, the Jury Instruction Committee revised a footnote in the instruction, specifically in response to inquiries related to the first Cicchini article. The footnote advises that "[a]fter careful consideration, the Committee decided not to change the text of the instruction" because "[c]hallenges to including 'search for the truth' in the reasonable doubt instruction have been rejected by Wisconsin appellate courts." *See* WIS JI—CRIMINAL 140 (cmt, fn.v). The Committee did, however, recommend an additional sentence for trial courts to use if desired.

[5] "Forfeiture" is a more appropriate term than "waiver" under the circumstances of this case. *See* ***State v. Ndina***, 2009 WI 21, ¶¶28-32, 315 Wis. 2d 653, 761 N.W.2d 612 (distinguishing waiver from forfeiture). However, because the applicable statute in this case uses the term "waiver," we will use the same term for consistency.

*II. The Jury Instruction Challenge is Waived*

¶11 "At the close of the evidence and before arguments to the jury, the court shall conduct a [jury instruction] conference with counsel outside the presence of the jury." WIS. STAT. § 805.13(3); *see also* WIS. STAT. § 972.11(1). "Counsel may object to the proposed instructions … on the grounds of incompleteness or other error, stating the grounds for objection with particularity on the record. *Failure to object at the conference constitutes a waiver of any error in the proposed instructions*[.]" WIS. STAT. § 805.13(3) (emphasis added).

¶12 Trammell concedes that his attorney did not object to Instruction 140 at the conference but contends that his objection was nevertheless timely because it was made at the first opportunity when it was raised in his postconviction motion: Trammell had been sentenced on April 5, 2016, but the first law review article on which his challenge relies was not published until April 25, 2016.

¶13 WISCONSIN STAT. § 805.13 does not require an objection to the instructions to be "timely." It requires an objection to be made at the instruction conference. Trammell cites no authority to suggest we can avoid the plain language of the statute. And, while in some instances this court can disregard waiver to reach an issue, we are without the broad discretionary authority to review an unobjected-to jury instruction. *See* ***State v. Schumacher***, 144 Wis. 2d 388, 409, 424 N.W.2d 672 (1988).

*III. The Objection is Controlled by* ***State v. Avila***

¶14 Even if we could overlook the lack of objection to Instruction 140 and consider Trammell's challenge to the dual directives therein, he would not prevail. Again, Trammell contends Instruction 140 was improper because it:

(1) reduces the State's burden of proof below the "beyond a reasonable doubt" standard required by ***In re Winship***, 397 U.S. 358, 364 (1970), thereby violating due process; (2) confuses the jury; and (3) misstates the law.

¶15 A similar challenge to the propriety of Instruction 140 and the dual directives was considered and rejected by our supreme court in ***State v. Avila***, 192 Wis. 2d 870, 535 N.W.2d 440 (1995).[6] Avila challenged the same language from Instruction 140 as Trammell does: "While it is your duty to give the defendant the benefit of every reasonable doubt, you are not to search for doubt. You are to search for the truth." *See* ***Avila***, 192 Wis. 2d at 888. Avila argued "that, in light of this language, a juror acting reasonably would be reasonably likely to impose a lesser burden than reasonable doubt upon the State" and that "the language implies that truth and doubt are two separate concepts, i.e., that finding doubt would mean not finding the truth." ***Id.*** at 888-89.

¶16 Our supreme court rejected Avila's challenge. It concluded that

> it is not reasonably likely that the jury understood Wis. JI—CRIMINAL 140 (1991), to allow conviction based on proof below the *Winship* reasonable doubt standard.… [W]e examine the objected to language within the context of the entire instruction.
>
> ….
>
> …The instruction as a whole emphasizes with great clarity that the State bears the burden of proving the defendant's guilt beyond a reasonable doubt, and that a defendant is presumed innocent until that burden is met. In the context of the entire instruction, we conclude that Wis.

[6] ***State v. Avila***, 192 Wis. 2d 870, 532 N.W.2d 423 (1995), was reversed in part by ***State v. Gordon***, 2003 WI 69, ¶5, 262 Wis. 2d 380, 663 N.W.2d 765, but only to the extent that ***Avila*** "established a rule of automatic reversal where a jury instruction omits an element of the offense."

> JI—CRIMINAL 140 (1991), which was read to the jury, did not dilute the State's burden of proving guilt beyond a reasonable doubt.

***Avila***, 192 Wis. 2d at 889-90.

¶17 Trammell asserts that, in light of the law review articles, ***Avila*** should be overruled. Even if we agreed with this sentiment, we cannot act upon it. "The supreme court is the only state court with the power to overrule, modify or withdraw language from a previous supreme court case."[7] ***Cook v. Cook***, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997).

*IV. Additional Arguments are Unavailing.*

¶18 Trammell also contends that Instruction 140 misstated the law as a whole, constituting an "instructional error" that goes to the "integrity of the fact-finding process" under ***State v. Hatch***, 144 Wis. 2d 810, 824-25, 425 N.W.2d 27 (Ct. App. 1988) (where "waived instructional error" went to "'integrity of the fact-finding process'" under ***State v. Shah***, 134 Wis. 2d 246, 254, 397 N.W.2d 492 (1986), this court exercised its discretion to review error notwithstanding waiver). However, the supreme court, subsequent to ***Hatch***, held that this court "does not have the power to find that unobjected-to errors go to the integrity of the fact-finding process, and therefore may properly be reviewed by the court of appeals." *See* ***Schumacher***, 144 Wis. 2d at 409. Only the supreme court may review unobjected-to errors under the "integrity of the fact-finding process" test exception to WIS. STAT. § 805.13(3). *See* ***Schumacher***, 144 Wis. 2d at 406-07.

[7] We decline Trammell's alternate request to certify this case to the supreme court.

¶19 Trammell contends that he is entitled to a new trial in the interest of justice because WIS JI—CRIMINAL 140 incorrectly stated the burden of proof and, under ***Vollmer v. Luety***, 156 Wis. 2d 1, 19-20, 456 N.W.2d 797 (1990), this court has the authority to review "an error in the jury instructions" notwithstanding waiver if that error caused the real controversy to have not been fully tried. However, ***Vollmer*** noted as an example a case where "an erroneous instruction was given on a significant issue." *See* ***id.*** at 20. Under ***Avila***, WIS JI—CRIMINAL 140 is not erroneous.[8]

¶20 Finally, Trammell asserts it was plain error to use Instruction 140, and reversal is appropriate for plain error, notwithstanding any waiver. But ***Schumacher*** concluded that the plain error doctrine, as applied to jury instructions, "was superseded in respect to the claimed instruction error by [WIS. STAT. §] 805.13(3)" and was subsequently limited to evidentiary questions. *See* ***Schumacher***, 144 Wis. 2d at 402. Trammell did not object to the instruction under § 805.13(3), and the issue is not an evidentiary question.

[8] For this reason, Trammell's reliance on ***State v. Austin***, 2013 WI App 96, 349 Wis. 2d 744, 836 N.W.2d 833, is also unavailing. Austin was charged with two counts of first-degree recklessly endangering safety with a dangerous weapon. At trial, he presented sufficient evidence to bring the affirmative defenses of self-defense and defense of others into play. *See* ***id.***, ¶2. The jury was given no instruction at all on the State's burden for self-defense, *see* ***id.***, ¶7, but there was an instruction that the State had to disprove defense of others beyond a reasonable doubt, *see* ***id.***, ¶8. We ultimately concluded that the self-defense jury instruction as given was not a "proper statement of the law of self-defense," that the defense-of-others instruction given on lesser-included charges was also erroneous, and that a new trial was warranted in the interest of justice. *See* ***id.***, ¶¶18-19, 23.

Under ***Avila***, however, Instruction 140 is a proper statement of the law and of the State's burden. *See* ***Avila***, 192 Wis. 2d at 889-90. Thus, Trammell is not entitled to a new trial.

## *V. Conclusion*

¶21 Any objection to Instruction 140 needed to be made at the jury instruction conference or be waived. In any event, ***Avila*** holds that the instruction properly states the law; even if we disagreed, we are bound by that conclusion. Because the jury instruction is a proper statement of the law, its use did not prevent the real controversy from being fully tried, and neither the "integrity of the fact-finding process" test nor the plain-error doctrine permits us to reach the issue some other way.

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

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