STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT II

Case No. 2013AP002592-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CHARLES L. CHEW,

Defendant-Appellant.

On Appeal From a Judgment of Conviction
Entered in the Sheboygan County Circuit Court,
The Honorable Terence T. Bourke Presiding

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUES PRESENTED

I. Two men unknown to Mr. Chew entered his apartment when he was having a verbal argument with his ex-girlfriend, chased him to his bedroom and physically attacked him, breaking his nose and three ribs. While being beaten, Mr. Chew reached for a gun and shot twice, hitting both men in the leg, and then followed the men three steps past the threshold of his apartment door and shot four more times, hitting no one. Did the court err when it denied Mr. Chew's request for a jury instruction based on the new law known as the "castle doctrine"?

The circuit court distinguished apartments from single family homes and concluded the castle doctrine did not apply because Mr. Chew was in public when he stepped outside his apartment door.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Mr. Chew would welcome oral argument if the court felt it would be beneficial but is not requesting it. This case involves interpretation of a new law therefore publication may be warranted.

STATEMENT OF THE CASE AND FACTS

Sheboygan County charged Charles L. Chew with one count of second degree recklessly endangering safety with the use of a dangerous weapon. (1). The following facts are from Mr. Chew's jury trial.

Trial

For a year, Mr. Chew lived with Cheryl McCranie and her son. (54:115-16). Although Mr. Chew never signed a lease, in August 2012, he moved with Ms. McCranie into an apartment on Rangeline Road in Sheboygan Falls. (54:116). Ms. McCranie claimed she was never in a relationship with Mr. Chew even though they were living together and shared a bedroom. (54:131). Mr. Chew described their relationship as "friends with benefits." (55:58).

Mr. Chew and Ms. McCranie eventually decided to end their relationship. (55:59). That process involved trying to figure out how they would live at separate locations. (55:59). Around October 27 or 28, 2012, Ms. McCranie went to stay with her parents. (54:116). Mr. Chew continued to live at the apartment on Rangeline Road. Less than a week later, on November 1, Ms. McCranie's new boyfriend Andrew Lee moved in with her at her parent's house. (54:132).

A few days later on November 5, 2012, at about five or six in the morning, Ms. McCranie went to the apartment on Rangeline Road, with her new boyfriend and his friend Andreaius Lucas. (54:117). Both men were strangers to Mr. Chew. (55:64). Ms. McCranie claimed she went to apartment to get clothes for her and her son. (54:116, 118). Ms. McCranie also claimed she brought the two men because she was afraid of Mr. Chew but then went into the apartment

by herself and left them in the car. (54:119). She sent Mr. Chew a text message telling him she was coming over but never mentioned anything about Mr. Lee or Mr. Lucas. (54:134).

While Mr. Lee and Mr. Lucas were waiting in the car, they called Ms. McCranie to see if she was alright. (54:120). She told them she was fine. (54:120). They told her they would get out of the car to check and Ms. McCranie should nod if she was alright. (54:120). They got out of the car, went into the hallway and Ms. McCranie nodded indicating she was fine. (54:120).

Mr. Chew testified that when Ms. McCranie came over they talked for a couple of minutes before the phone started ringing. (55:61). She picked it up the first time and asked the guy to call back because they were having a serious conversation, which got a little heated. (55:62). They were discussing the living arrangements. (55:79). Mr. Lucas testified that before the two men entered the apartment he heard a "back and forth" argument between Ms. McCranie and Mr. Chew. (54:181). Even though he alleged the fight got louder and he heard Ms. McCranie say let go of me, Mr. Lucas also testified there "wasn't much hostility" and he could hear Ms. McCranie arguing. (54:159, 175, 181).

Everyone testified consistently that Mr. Lee and Mr. Lucas eventually entered the apartment, chased Mr. Chew to his bedroom and physically attacked him. They broke Mr. Chew's nose, three ribs, and gave him other bumps and bruises. (55:75). The state charged both Mr. Lee and Mr. Lucas with substantial battery, which they plead down to disorderly conduct, for attacking Mr. Chew. (54:152-53, 174).

The testimony about what happened right before Mr. Lee and Mr. Lucas forced their way into the apartment differs. Ms. McCranie alleged when she went to leave Mr. Chew slammed the door and locked it. (54:121). She then alleged that when she tried to unlock the door he grabbed her arm and tried to drag her into the back room. (54:121). Although she claimed she told her two male companions that they had permission to come in if she needed help, Mr. Lee and Mr. Lucas both testified there was never any conversation about going into the apartment. (54:121, 157, 179). "She never asked [them] to come in." (54:157).

Mr. Lee testified that he could see Ms. McCranie and Mr. Chew through a window but admitted he could not see clearly into the apartment. (54:144, 158). Still, Mr. Lee alleged he saw Ms. McCranie try to leave and Mr. Chew pushed the door closed with force. (54:144). Conversely, Mr. Lucas testified he could not see what was going on in the apartment. (54:180).

According to Mr. Lee, he just reacted and went into the apartment. (54:144). He claimed Mr. Chew had Ms. McCranie by the arm when he entered the apartment. (54:145).

On the other hand, Mr. Lucas testified that Mr. Lee called Ms. McCranie and tried to get her to come out but it did not happen. (54:167). Then he called again and asked her to unlock the door. (54:168). The door unlocked but then the door slammed shut. (54:168). However, he testified it was unlocked again and that was when they went in. (54:168).

Mr. Chew explained that Ms. McCranie walked over and unlocked the door. (55:62). When she did it Mr. Chew looked at her inquisitively and went over and locked the door

again because he is used to locking doors for safety purposes. (55:62-63). Ms. McCranie then got another phone call and she walked over and unlocked the door again. (55:63). Mr. Chew thought that was strange. He began to lock it again but two men pushed in the door. (55:63). They "shoved it open." (55:63). Mr. Chew tried to push the door closed when he felt it being forced open but he could not do it. (55:63). Mr. Chew backed away from the door and two men came into the apartment. (55:63). Mr. Chew testified that he never tried to stop Ms. McCranie from leaving the apartment. (55:78).

Mr. Chew was terrified because he did not know the men forcing their way into his apartment and did not know what was going to happen. (55:64). The two intruders came in running and swinging. (55:64). Mr. Chew remembers being hit in the forehead which made him move quickly away from the door. (55:64-65).

After Mr. Chew was hit, he ran into the bedroom. (55:65-66). While he was running, Mr. Chew had to try to block these men from hitting him. (55:65). Mr. Chew went into the back bedroom because he had golf clubs he thought he could use to protect himself. (55:67). However, as Mr. Chew got to the bedroom he tripped and fell and one of the men got on top of him and began hitting Mr. Chew in the face while the other man hit and kicked Mr. Chew. (55:66).

When Mr. Chew was on the ground being beaten and punched by the two strangers he was thinking "I hope they don't kill me. I don't want to die like this." (55:67-68).

Mr. Lee and Mr. Lucas confirmed Mr. Chew's description of the physical attack. They admitted when they entered the apartment Mr. Chew ran and they immediately chased after him. (54:145-46). Mr. Lee hit Mr. Chew first and then kept hitting him. (54:160). Mr. Lucas was also throwing

punches at Mr. Chew. (54:182). Mr. Chew tried to punch back but he was not able to. (54:159).

In the midst of his beating, Mr. Chew felt a gun on one of the men's waist. (55:68). He was able to grab it and fire. (55:68). He felt he needed to do something to get them off of him. (55:68). Both men denied ever having a gun. (54:142-43, 173). Mr. Chew hit each man in the leg when he fired the gun twice to get the intruders off of him. (54:150, 170; 55:69). The men then went towards the living room and Mr. Chew immediately followed them. (55:69). In the doorway of his building Mr. Chew fired more shots because he did not know whether the intruders were going to get another weapon from around the corner or if they were going to get more people. (55:70). He wanted to scare them off so they would leave him alone. (55:70-71). After he shot a few times in the doorway, Mr. Chew then started looking for his phone so he could call 911. (55:72).

According to Dineah Gollihue, who lives in Mr. Chew's apartment building, she heard loud footsteps and banging on the wall before she heard pops. (54:186-87, 191). She grabbed her phone and went into the hallway, where she saw Mr. Chew. (54:186-87).

Mr. Chew was disoriented and had blood on his face. (54:187). He repeatedly asked Ms. Gollihue to call the police. (54:187). He was standing between the front entrance door and his apartment door. (54:187). At that time, Ms. McCranie came back and tried to go into the apartment. (54:194). Ms. Gollihue told her she should leave and she did. (54:194).

Another neighbor, Justin Davis, testified he heard noises and screams so he went into the hallway. (54:198). He saw Mr. Chew with a gun. (54:198). He heard three to six shots, which were in rapid succession. (54:199, 203).

Mr. Chew was standing "very close" to his apartment door, about three steps away. (54:203). The outside door is just next to Mr. Chew's apartment door. (54:203). The police arrived shortly thereafter. (54:202).

Castle Doctrine

Prior to trial, defense counsel requested a special jury instruction pursuant to Wis. Stat. § 939.48(1m)(ar), which he described as the "castle doctrine." (17). Defense counsel attached a proposed instruction to its motion. (17:3-4; App. 116-17). The proposed instruction explained there is a presumption that Mr. Chew acted reasonably in using force if "Andrew Lee and Andreaius Lucas were in the defendant's dwelling after unlawfully and forcibly entering it, the defendant was present in the dwelling and the defendant knew or reasonably believed that Andrew Lee and Andreaius Lucas had unlawfully and forcibly entered the dwelling." (17:3; App. 116). The instruction defined "dwelling" and "forcibly." (Id.)

At a pretrial hearing, the court concluded before the defense could reference the castle doctrine there would have to be more information provided. (53:33). The court also stated it saw the questions regarding "unlawful and forcible entry" as a legal issue. (53:34). At that point, the court was not convinced the entry was unlawful. (53:34). The court focused on facts alleged at the preliminary hearing and in the complaint to suggest Ms. McCranie, who was on the lease, consented to the two men entering the home. (53:34-36).

After the state closed its case, defense counsel requested a dismissal based on "the so-called castle doctrine." (55:51). The court concluded it was a jury instruction issue. (55:51).

Defense counsel requested the castle doctrine instruction again at the close of evidence. (55:113). The court changed its mind about the reasons it gave at the previous hearing for denying the request (that the entry was lawful) (55:121), but nonetheless found the castle doctrine did not apply for a different reason. (55:121).

The court distinguished an apartment building, which is where Mr. Chew lived, from a single family home. (55:121-22). It concluded that when the statute referenced "driveways, sidewalks, swimming pools, terraces, patios, fences, porches, garages, and basements, I interpret that to mean parts of a single family unit. If I own a home and there's somebody on my porch that I don't want to be there, I've got the absolute right to tell them to get out." (55:122).

The court went on to explain it was looking at "control." (55:122). According to the court, it was important that the doorway to Mr. Chew's apartment building, which was steps away from his apartment door, was open to the public. (55:122). "Once he crosses the threshold he's not defending his home anymore." (55:122). Therefore, the court concluded the castle doctrine did not apply in Mr. Chew's case. (55:123).

The jury found Mr. Chew guilty and the court sentenced him to two years, six months of initial confinement and five years extended supervision. (56:18). Mr. Chew now appeals.

ARGUMENT

I. The Circuit Court Erred When It Concluded the Castle Doctrine Did Not Apply in Mr. Chew's Case and the Error Was Not Harmless, Therefore Mr. Chew Is Entitled to a New Trial.

A. Introduction.

Two men, unknown to Mr. Chew, physically attacked him in his own home. These men barged into the apartment, chased Mr. Chew to the bedroom and immediately began beating him, breaking his nose and three ribs. The men claimed they forced their way into Mr. Chew's apartment to protect Ms. McCranie even though she did not need protection and their attack went far beyond any alleged protection. When the two intruders had Mr. Chew pinned on the ground beating him, he was able to grab a gun. He shot twice. In a beaten, bloody, and disoriented state Mr. Chew followed the intruders just past the threshold of his apartment door and shot a few more times. When he fired the last shots he did not know who the men were, where they were going, or who or what they would bring back with them. He wanted to protect himself. Mr. Chew then dropped the gun and immediately asked his neighbor to call the police. (54:187).

The legislature recently enacted a new law meant to protect people, like Mr. Chew, who were defending themselves in their homes. This new law is often referred to as the "castle doctrine." It created a "presumption of immunity from criminal actions" when a person uses force against an individual who is in the process of, or already unlawfully and forcibly entered the actor's dwelling, motor

vehicle, or place of business. Legislative Council Act Memo, 2011 Wisconsin Act 94 (Dec. 13, 2011); App. 118-20.[1] It also prohibits the court from considering whether the actor had an opportunity to flee or retreat. In other words, it better protects people who are defending themselves and their families from intruders in their homes, vehicles, and businesses.

As will be discussed herein, the castle doctrine should have been applied in Mr. Chew's case. Meaning, the jury should have been instructed that if it concluded certain predicate facts existed (i.e. unlawful and forcible entry) then it must presume Mr. Chew reasonably believed force was necessary to prevent imminent death or great bodily harm. It should have also been instructed it could not consider whether Mr. Chew had the opportunity to flee. The court erred when it denied Mr. Chew's request for a castle doctrine instruction, the error was not harmless, and therefore he is entitled to a new trial.

B. Statutory interpretation and standard of review.

This case requires interpretation of Wis. Stat. § 939.48(1m)(ar), the castle doctrine. Before it applies, the defense must show by "some evidence" that (1) the person against whom force was used was in the process of unlawfully and forcibly entering the defendant's dwelling, motor vehicle, or business *or* was in the defendant's dwelling, motor vehicle, or business after unlawfully and forcefully entering, (2) the defendant was present in the dwelling, motor vehicle, or business, and (3) the defendant knew or reasonably believed the person unlawfully and

[1] Also available on the internet at https://docs.legis.wisconsin.gov/2011/related/lcactmemo/ab69.pdf.

forcibly entered or was in the process of doing so. Specifically, Wis. Stat. § 939.48(1m)(ar) states:

> (ar) If an actor intentionally used force that was intended or likely to cause death or great bodily harm, the court may not consider whether the actor had an opportunity to flee or retreat before he or she used force and shall presume that the actor reasonably believed that the force was necessary to prevent imminent death or great bodily harm to himself or herself if the actor makes such a claim under sub. (1) and either of the following applies:
>
> 1. The person against whom the force was used was in the process of unlawfully and forcibly entering the actor's dwelling, motor vehicle, or place of business, the actor was present in the dwelling, motor vehicle, or place of business, and the actor knew or reasonably believed that an unlawful and forcible entry was occurring.
>
> 2. The person against whom the force was used was in the actor's dwelling, motor vehicle, or place of business after unlawfully and forcibly entering it, the actor was present in the dwelling, motor vehicle, or place of business, and the actor knew or reasonably believed that the person had unlawfully and forcibly entered the dwelling, motor vehicle, or place of business.

The new law does not apply when:

> 1. The actor was engaged in a criminal activity or was using his or her dwelling, motor vehicle, or place of business to further a criminal activity at the time.
>
> 2. The person against whom the force was used was a public safety worker, as defined in s. 941.375(1)(b), who entered or attempted to enter the actor's dwelling, motor vehicle, or place of business in performance of his or her official duties…

Wis. Stat. § 939.48(1m)(b).

Statutory interpretation focuses primarily on the language of the statute. ***State ex rel. Kalal v. Circuit Court for Dane Cnty.***, 2004 WI 58, 271 Wis. 2d 633, ¶ 44, 681 N.W.2d 110. If the meaning of the statute is plain, the inquiry ordinarily stops. ***Id.*** at ¶ 45.

However, the plain meaning of the statute is also discerned from context and purpose. ***Id.*** at ¶ 46. "Therefore, statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." ***Id.*** If scope, context, and purpose are ascertainable from the text and structure of the statute itself then it is relevant to a plain-meaning interpretation. ***Id.*** at ¶ 48.

When the statute is ambiguous the court should consult extrinsic sources, such as legislative history. ***Id.*** at ¶ 50. When the statute is unambiguous, legislative history may be used only "to confirm or verify a plain-meaning interpretation." ***Id.***

Statutory interpretation is a question of law, which requires de novo review. ***State v. Head***, 2002 WI 99, ¶ 41, 255 Wis. 2d 194, 648 N.W.2d 413. This case also requires review of the circuit court's decision not to instruct the jury on the castle doctrine. Whether there are sufficient facts to allow the circuit court to give a certain jury instruction is a question of law, which is also subject to de novo review. ***Id.*** at ¶ 44.

C. There is "some evidence" that the castle doctrine should apply here.

The first issue is whether the castle doctrine should apply in Mr. Chew's case, thereby requiring the circuit court to instruct the jury accordingly. Defendants are entitled to relevant self-defense instructions when the trial evidence places self-defense in issue. ***Head***, 255 Wis. 2d 194, ¶ 4. This is true for perfect and imperfect self-defense and now it should also apply to the castle doctrine.

The "some evidence" standard should be used to determine whether the jury should be given a certain self-defense instruction. ***State v. Peters***, 2002 WI App 243, ¶ 22, 258 Wis. 2d 148, 653 N.W.2d 300. This is a low threshold. ***State v. Schmidt***, 2012 WI App 113, ¶ 12, 344 Wis. 2d 336, 824 N.W.2d 839.

The circuit court must determine whether a reasonable construction of the evidence, viewed most favorably to the defendant, will support the defendant's theory. ***Id.*** (*citing* ***Head***, 258 Wis. 2d 194, ¶¶ 113, 115). In other words, if the evidence viewed most favorably to the defendant would allow a jury to conclude the state did not disprove the self-defense theory beyond a reasonable doubt, then the court should submit the relevant jury instruction. ***Id.*** Therefore, if the defense shows there is "some evidence" of the predicate facts needed for the castle doctrine to apply, the jury should be instructed on the castle doctrine.

1. Unlawful and forcible entry.

The court must first determine whether there is "some evidence" the two intruders in this case unlawfully and forcibly entered Mr. Chew's home. Unlawful is defined as "either tortious or expressly prohibited by criminal law or both." Wis. Stat. § 939.48(6).

Forcibly is not defined in the Wis. Stat. § 939.48. However, the jury instruction for robbery: threat or use of force states "[f]orcibly means that the defendant actually used force against [the intruder] with the intent to overcome or prevent his physical resistance or physical power of resistance…" Wis. JI-Criminal 1479. Defense counsel requested that the instruction state "'Forcibly' means any force which facilitates the unlawful entry of the dwelling. Forcible entry does not require that damage or injury result from an actor's conduct." (17:3). Both definitions are reasonable interpretations of forcible and both are satisfied by the facts in Mr. Chew's case.

Here, Mr. Chew testified that he began to lock his door after Ms. McCranie unlocked it when two unknown men pushed in the door. (55:63). They "shoved it open." (55:63). Mr. Chew tried to push the door closed when he felt it being forced open but he could not do it. (55:63). The intruders came in running and swinging. (55:64).

There is no question from anyone's testimony that the men came in and immediately chased Mr. Chew to his bedroom and began violently attacking him. This is not a situation where an argument escalated *after* the two men entered Mr. Chew's home. The intruders violently attacked Mr. Chew immediately after they pushed their way in,

without giving it a second thought. They did exactly what they intended to do.

These men were strangers to Mr. Chew. He had no idea they were associated with Ms. McCranie. He only knew that two strange men forced their way into his apartment and violently attacked him, for which they were later charged and convicted. (54:152-53, 174). This was an unlawful and forcible entry.

The circuit court's ruling on this issue confirms there was, at minimum, "some evidence" that the intruders unlawfully and forcibly entered Mr. Chew's home. Prior to trial when the parties were addressing whether the castle doctrine should apply, the court was not convinced the entry was unlawful. (53:34). At that time, it focused on facts alleged at the preliminary hearing and in the complaint which suggested Ms. McCranie, who was on the lease, consented to the two men entering the home. (53:34-36).

However, after the court heard the evidence presented at trial, it changed its mind about the reasons it gave at the previous hearing, tacitly acknowledging the entry was unlawful and forcible. (55:121). In other words, it no longer believed there was insufficient evidence that the entry was unlawful and forcible. For these reasons, there is more than "some evidence" that the intruders entered unlawfully and forcibly.

2. Dwelling and Mr. Chew's presence therein.

The court must next determine whether there is "some evidence" that the intruders entered Mr. Chew's "dwelling" while Mr. Chew was inside. Wis. Stat. § 939.48(1m)(ar)2. The statute uses the definition of dwelling from Wis. Stat. § 895.07(1)(h). It states,

> "Dwelling" means any premises or portion of a premises that is used as a home or place of residence and that part of the lot or site on which the dwelling is situated that is devoted to residential use. "Dwelling" includes other existing structures on the immediate residential premises such as driveways, sidewalks, swimming pools, terraces, patios, fences, porches, garages, and basements.

Wis. Stat. § 895.07(1)(h).

There is no question Mr. Chew's apartment was a "dwelling." He lived there. It was his home. Mr. Chew was in his home when the two intruders barged in, chased him to his bedroom, and violently attacked him. He was also in his dwelling when he followed his assailants just outside his apartment door in hopes that they would not return to finish the job. Mr. Chew was in the doorway to his apartment building when he shot the gun. He was just three steps from his apartment door. (54:203). This is still considered a "dwelling" because it is within the "immediate residential premises." Wis. Stat. § 895.07(1)(h).

The circuit court distinguished apartments from single family units. (55:122). In doing so, it concluded the portion of the statute referring to "driveways, sidewalks, swimming pools…" did not apply to apartment buildings. (55:122). The circuit court explained its interpretation was based on

"control." (55:122). It concluded that because the doorway was in a public area Mr. Chew should not have the presumption described by the castle doctrine. (55:123).

This interpretation is wrong. The statute does not distinguish, in any way, between single family homes and apartment buildings. Nor does the plain language of the statute allow for any such interpretation. In fact, the statute does the opposite. It states "home *or place of residence*." Wis. Stat. § 895.07(1)(h) (emphasis added). In other words, the legislature specifically included more than just a person's single family home. It was written expansively. It included any "residence," which includes an apartment.

The legislature also included other structures on the "immediate *residential* premises." There is no distinction in the statute between single family homes and an apartment building. Therefore, the circuit court's interpretation was wrong. Mr. Chew was in his dwelling when his attackers chased him to the back bedroom and broke his nose and three ribs. He was also on his immediate residential premises when he shot from the doorway to protect himself from the intruders who could easily return to finish what they started.

Making a distinction between single family homes and apartment buildings would lead to absurd results. For example, it would mean people who rent in multi-unit dwellings do not have the same right to protect themselves in their homes as people who are financially able to purchase a single family home. The legislature did not intend such an absurd result.

Additionally, the court's reasoning is internally inconsistent with the new law. The castle doctrine also applies to places of business and motor vehicles. Wis. Stat. § 939.48(1m)(ar). Businesses are public places and motor

vehicles are regularly in public places (roads, parking lots, common driveways). The legislature's inclusion of businesses and motor vehicles further confirms that it never intended to make a public/private distinction between single family homes and apartment buildings.

The public/private distinction is also unworkable when considering sidewalks and driveways. Members of the public use sidewalks and driveways to get to the person's door. They are open to the public the same way a hallway is open to the public in an apartment building. Both are paths to the resident's door. Both are within the immediate residential premises, and therefore are protected by the castle doctrine.

At minimum, there is "some evidence" the castle doctrine applies in this situation. Therefore, the jurors should have been instructed accordingly.

D. How the castle doctrine should be applied.

The legislature changed the privilege of self-defense in two significant ways when it enacted the castle doctrine. When it applies, (1) the court cannot consider whether the actor had the opportunity to retreat and (2) it must presume the actor reasonably believed force was necessary to prevent "imminent death or great bodily harm." Wis. Stat. § 939.48(1m)(ar). Since there is "some evidence" of the predicate facts, the jurors should have been instructed that if they concluded the predicate facts existed: (1) they were not allowed to consider whether Mr. Chew retreated and (2) they must presume Mr. Chew reasonably believed force was necessary to prevent imminent death or great bodily harm. (17:3-4; App. 116-17).

1. Duty to retreat.

The actor's duty to retreat is the first significant change with the new law. Before the castle doctrine, in self-defense cases the jury would be instructed as follows regarding the defendant's duty to retreat:

> There is no duty to retreat. However, in determining whether the defendant reasonably believed the amount of force used was necessary to prevent or terminate the interference, *you may consider* whether the defendant had the opportunity to retreat with safety, whether such retreat was feasible, and whether the defendant knew of the opportunity to retreat.

Wis. JI-Criminal 810 (emphasis added). The court read this instruction to the jury in Mr. Chew's case. (55:139).

The castle doctrine changes this instruction because if it applies the jury *may not consider* whether the defendant had the opportunity to flee or retreat. Wis. Stat. § 939.48(1m)(ar). Therefore, if the castle doctrine applies, reading this instruction to the jury would be error.

The Wisconsin Jury Instruction Committee has confirmed that the jury instruction regarding retreat must change. Wis. JI-Criminal 805A Law Note, p. 10. It has concluded when the castle doctrine applies the court should instruct the jury as follows:

> There is no duty to retreat. You *must not consider* evidence relating to whether the defendant had an opportunity to flee or retreat in deciding whether the state has proved that the defendant did not act lawfully in self-defense.

Id. (emphasis added). Defense counsel in this case requested a similar instruction, among other changes that will be

discussed below. With regard to the duty to retreat defense counsel requested the following instruction:

> There is no duty to retreat. If you are satisfied that Andrew Lee and Andreaius Lucas unlawfully and forcibly entered the dwelling of the defendant, you *may not consider* whether the defendant had the opportunity to flee or retreat.

(17:4; App. 117).

Therefore, if the castle doctrine applies here, meaning the defense presented "some evidence" of the predicate facts, then it was error for the court to tell the jury it could consider whether Mr. Chew had the opportunity to retreat.

2. Presumption of reasonableness.

The legislature also created a presumption of reasonableness when it enacted the castle doctrine. When the predicate facts are met "the court *shall presume* that the actor reasonably believed that the force was necessary to prevent imminent death or great bodily harm…" Wis. Stat. § 939.48(1m)(ar) (emphasis added).

The plain language of the statute created a conclusive presumption. There are two types of presumptions: permissive presumptions and conclusive[2] presumptions. ***State v. Vick***, 104 Wis. 2d 678, 693, 312 N.W.2d 489 (1981) (quotation omitted). "A permissive presumption, or permissive inference allows, but does not require, the trier of fact to find an element of the crime (elemental fact) upon proof by the prosecution of another fact (basic fact), and it

[2] Conclusive presumptions are also known as mandatory or irrebuttable presumptions. ***State v. Vick***, 104 Wis. 2d 678, 693, 312 N.W.2d 489 (1981) (quotation omitted).

places no burden of any kind on the defendant." ***Id.*** With a permissive presumption, the trier of fact can reject the inference. ***Id.***

On the other hand, "[a] conclusive presumption is an irrebuttable direction by the trial court to find the elemental fact once the jury is convinced of the basic facts triggering the presumption." ***Id.*** This case presents a conclusive presumption. Meaning, the court should instruct the jury that if it finds the predicate facts occurred (basic facts) it must presume Mr. Chew reasonably believed force was necessary. The statute does not provide any way to rebut the presumption once the jury finds the predicate facts.

This plain meaning interpretation is verified by the statute's legislative history. The State Assembly offered an amendment that would have deleted "shall presume" and substituted "a rebuttable presumption." Assembly Amendment 5, to Assembly Substitute Amendment 3, to 2011 Assembly Bill 69; App. 121.[3] The legislature never adopted this proposal. This confirms that the legislature's use of mandatory language was intentional and meant to create a conclusive presumption.

If the legislature intended to create a rebuttable presumption it would have said so. For example, in Ohio the legislature specifically created a rebuttable presumption in its castle doctrine statute. It stated, "the presumption… is a rebuttable presumption and may be rebutted by a preponderance of the evidence." Ohio Rev. Code § 2901.05. It logically follows that since the Wisconsin legislature

[3] Also available on the internet at https://docs.legis.wisconsin.gov/2011/related/amendments/ab69/aa5_asa3_ab69.

specifically rejected reference to a "rebuttable" presumption, unlike Ohio, it must have created a conclusive presumption.

Additionally, the Legislative Council's Act Memo stated the new legislation "create[d] a presumption of immunity from criminal actions involving force that is intended or likely to cause death or great bodily harm. An actor is presumed to have *reasonably believed that the force was necessary to prevent imminent death or great bodily harm* to himself or herself" if the predicate facts are met. Legislative Council Act Memo, 2011 Wisconsin Act 94 (Dec. 13, 2011) (emphasis in original); App. 118-20. The Legislative Council's description further confirms that the legislature intended to create a presumption of immunity when the predicate facts exist.

Therefore, if the court finds "some evidence" that the predicate facts exist, the court must instruct the jury regarding those facts and the accompanying presumption. This is precisely what the defense requested in this case. (17:3-4; App. 116-17).

E. The error was not harmless.

The court's erroneous decision not to give the jury a castle doctrine instruction was not harmless. "An error is harmless if the beneficiary of the error 'proves beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" ***State v. Mayo***, 2007 WI 78, ¶ 47, 301 Wis. 2d 642, 734 N.W.2d 115 (*quoting* ***Chapman v. California***, 386 U.S. 18 (1967)). In other words, "Is it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?" ***State v. Harvey***, 2002 WI 93, ¶ 46, 254 Wis. 2d 442, 647 N.W.2d 189 (*quoting* ***Neder v. United States***, 527 U.S. 1, 18 (1999)).

The jury here never had the opportunity to decide whether the castle doctrine applied. If the jury was properly instructed it could have concluded the predicate facts existed. If so, it would have to presume Mr. Chew acted reasonably. Meaning, the state would not have met its burden. The error directly impacted the jury's ability to consider whether Mr. Chew's actions were legally justifiable. Therefore, the error could not be considered harmless.

CONCLUSION

For all of the reasons stated above, Mr. Chew respectfully requests that the court reverse his conviction and order a new trial.

Dated this 28th day of January, 2014.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 5,657 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

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

Dated this 28th day of January, 2014.

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CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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.

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