STATE OF WISCONSIN

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

DISTRICT II

Case No. 2013AP2592-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 SUPPLEMENTAL APPENDIX OF PLAINTIFF-RESPONDENT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument. Publication of the court's decision is warranted because this case presents an issue of first impression regarding the applicability of the recently enacted Wis. Stat. § 939.48(1m).

STATEMENT OF THE CASE

Given the nature of the arguments raised in the brief of defendant-appellant Charles L. Chew, the State exercises its option not to present a statement of the case. *See* Wis. Stat. § (Rule) 809.19(3)(a). The relevant facts and procedural history will be discussed in the argument section of this brief.

ARGUMENT

Chew was convicted following a jury trial of one count of second-degree recklessly endangering safety with the use of a dangerous weapon (37:1; A-Ap. 101). He argues on appeal that the trial court erred by refusing to instruct the jury under the newly enacted Wis. Stat. § 939.48(1m), which is sometimes referred to as the "castle doctrine." *See* Wis JI-Criminal 805A (2013) (Law Note: Self-Defense under § 939.48(1m)), p. 2 (R-Ap. 104).[1]

The State agrees with Chew that the reason the trial court identified for refusing to give the instruction – that the new statute does not apply in common areas of apartment buildings – was incorrect. However, Chew was not entitled to the instruction for a different reason: the statute applies only when there has been an unlawful and forcible entry, and the men at whom he fired were

[1]The Wisconsin Criminal Jury Instructions Committee has noted while the new law is commonly termed the "Castle Doctrine," "caution should be used in relying on that term to accurately describe the new provision" because "[w]hile it is a convenient term, the substance of the 'Castle Doctrine' varies state by state." Wis JI-Criminal 805A, p. 2 (R-Ap. 104). The Committee used the term "the new rule" to describe the new statute. *See id.*

lawfully present with the consent of the tenant. Accordingly, this court should affirm the judgment of conviction and the order denying postconviction relief.

I. OVERVIEW OF THE NEW STATUTE.

The legislation that created the new statute, 2011 Wis. Act 94, has two sections. Section 1 pertains to civil liability for the use of force in response to an unlawful and forcible entry into a dwelling, motor vehicle, or place of business. *See* 2011 Wis. Act 94, § 1; R-Ap. 101-02. The provision of Act 94 at issue here, section 2, created a new subsection, sub. (1m), in the criminal code's statute governing self-defense and defense of others, Wis. Stat. § 939.48. Section 2 provides:

> **SECTION 2.** 939.48(1)(m) of the statutes is created to read:
>
> **939.48**(1m)(a) In this subsection:
>
> 1. "Dwelling" has the meaning given in s. 895.07(1)(h).
>
> 2. "Place of business" means a business that the actor owns or operates.
>
> (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.

2011 Wis. Act 94, § 2; R-Ap. 102.[2]

The new statute defines "dwelling" by reference to the definition of a dwelling in Wis. Stat. § 895.07(1)(h), the statute governing claims against contractors and suppliers. *See* Wis. Stat. § 939.48(1m)(a)1. The contractor liability statute defines "dwelling" as follows:

> (h) "Dwelling" means any premises or portion of a premises that is used as a home or a 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,

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[2]The presumption of reasonableness in Wis. Stat. § 939.48(1m)(ar) does not apply if the actor was engaged in criminal activity or was using the dwelling, motor vehicle, or place of business to further criminal activity, or if the person against whom the force was used was a public safety worker who entered or attempted to enter in the performance of his or her official duties. *See* 2011 Wis. Act 94, § 2; (creating Wis. Stat. § 939.48(1m)(b)); R-Ap. 102.

> terraces, patios, fences, porches, garages, and basements.

Wis. Stat. § 895.07(1)(h).

To the State's knowledge, there are no appellate decisions addressing the new statute. However, the Wisconsin Criminal Jury Instruction Committee has prepared a Law Note interpreting the statute. *See* Wis JI-Criminal 805A (2013) (Law Note: Self-Defense under § 939.48(1m)) (R-Ap. 103-13). The Committee summarized its conclusions as follows:

> A. The new rule does not change the substance of the existing privilege of self-defense defined in § 939.48 or create an alternative to the existing privilege.
>
> B. The new rule does affect what a defendant must show to have the privilege submitted to the jury – that is, it provides another way for the defendant to meet the burden of production.
>
> - "The court" refers to the trial judge, not the jury.
>
> - "The court shall presume" does not affect the state's burden of persuasion.
>
> - "The court . . . shall presume" provides another way for the defendant to meet the burden of production.
>
> C. When a defendant asserts the privilege of self-defense under the new rule, the "some evidence" test is applied to the predicate facts.
>
> D. When self-defense is presented to the jury in a case where the new rule applies, the substance of the new rule is not presented to the jury and the standard instructions on the

> privilege of self-defense can be used without change.
>
> E. The state may succeed in proving that the privilege does not apply by proving, beyond a reasonable doubt, that the defendant's conduct does not meet the definition in the standard instruction.
>
> F. When self-defense is presented to the jury in a case where the new rule applies, the standard instruction on retreat – Wis JI-Criminal 810 – should not be given.

Wis JI-Criminal 805A, p. 1; R-Ap. 103.

Chew argues that when the new statute applies, the jury instructions on self-defense are altered in two ways: first, "the jury *may not consider* whether the defendant had the opportunity to flee or retreat," Chew's brief at 19; and second, that the statute creates a "conclusive presumption" that the defendant "reasonably believed force was necessary." *Id*. at 21. The State agrees with the first point but not the second.

Retreat. The Jury Instructions Committee concluded that when self-defense is presented to the jury in a case in which the new statute applies, the standard instruction on retreat, Wis JI-Criminal 810 (2001), should not be given and that the court, upon request, should instruct the jury that it must not consider whether the defendant had an opportunity to flee or retreat. The Committee explained:

> Section 939.48(1m)(ar) also addresses retreat, providing that if the predicate facts apply, "the court may not consider whether the actor had an opportunity to flee or retreat before he or she used force . . ." The standard instruction that addresses retreat is Wis JI-Criminal 810. It provides that while "there

> is no duty to retreat" evidence relating to retreat may be considered in determining "whether the defendant reasonably believed the amount of force used was necessary to prevent or terminate the [unlawful] interference."
>
> In a case where the new rule may apply, the court should determine whether the predicate facts exist. This would again require the court to resolve any factual disputes or conflicting evidence relating to the predicates for the new rule under its authority under § 901.04(1): "Preliminary questions concerning . . . the admissibility of evidence . . . shall be determined by the judge . . ." If the court determines that the predicate facts exist, the court must not consider evidence relating to "whether the actor had an opportunity to flee or retreat" in making any decisions the court may be called upon to make regarding the privilege of self-defense. Further, as part of the court's obligation to instruct the jury on the law, the court should, upon request, 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.

Wis JI-Criminal 805A, p. 10 (R-Ap. 112).

The State agrees with the Committee's analysis. So, too, does Chew. *See* Chew's brief at 19 (citing Wis JI-Criminal 805A). The parties agree, therefore, that in a case in which the new statute applies, the jury should be instructed that it should not consider whether the defendant had an opportunity to flee or retreat when deciding

whether the State has proved that the defendant did not act lawfully in self-defense.

Presumption of reasonableness. The parties disagree, however, on the meaning and effect of the statutory language relating to the presumption of reasonableness. The statute provides that if the predicate facts set forth in sections 939.48(1m)(ar)1. or 939.48(1m)(ar)2. apply, "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).

Chew argues that this language creates a conclusive presumption and that "if the court finds 'some evidence' that the predicate facts exist, the court must instruct the jury regarding those facts and the accompanying presumption." Chew's brief at 22. He further argues if the jury had found that the predicate facts existed, not only must it "presume Mr. Chew reasonably believed force was necessary," but that presumption is not rebuttable. *Id*. at 21.

That interpretation is at odds with that of the Criminal Jury Instructions Committee, which concluded that the "shall presume" language does not change the substance of the self-defense privilege or alter the state's burden of persuasion; rather, the effect of that language is to provide another way for the defendant to meet the burden of production to warrant the court's giving a self-defense instruction. *See* Wis JI-Criminal 805A, pp. 1, 6-7 (R-Ap. 103, 108-09). Because the Committee has provided a thorough and thoughtful explanation of its interpretation of the statute, and because this court "generally view[s] the work of the Criminal Jury Instructions Committee as

persuasive," *State v. Schambow*, 176 Wis. 2d 286, 299, 500 N.W.2d 362 (Ct. App. 1993), the State will quote the Committee's analysis in full:

> **A. The new rule does not change the substance of the existing privilege of self-defense defined in § 939.48 or create an alternative to the existing privilege.**
>
> The new rule applies where "the actor makes . . . a claim under sub. (1)," referring to sub. (1) of § 939.48, which is the definition of the privilege of self-defense. Because the new rule plays a role only if "the actor makes . . . a claim under sub. (1)," the new rule is tied to the definition of the existing privilege and does not create an alternative to the existing privilege. The existing privilege under sub. (1), was not changed by Act 94. As applied to the use of deadly force, § 939.48(1) still requires that the actor "reasonably believe that the force used was necessary to prevent imminent death or great bodily harm to himself or herself."
>
> **B. The new rule does affect what a defendant must show to have the privilege submitted to the jury – that is, it provides another way for the defendant to meet the burden of production.**
>
> The new rule provides that if the actor makes a claim under sub. (1) and the predicate facts apply, "the court . . . shall presume that the actor reasonably believed that the force was necessary to prevent imminent death or great bodily harm to himself or herself." The Committee considered two issues relating to this provision: 1) whether the reference to "the court" refers to the judge alone, or whether it also applies to the jury; and, 2) what the effect is of requiring the court to employ the presumption. The Committee concluded that

the reference to "the court" refers to the trial judge, not the jury, and that the effect of the presumption is to assist the defendant in meeting the burden of production that is required to make the privilege of self-defense [as defined in sub. (1) of § 939.48] an issue in the case.

- **"The court" refers to the trial judge, not the jury.**

In most situations, "the court" refers to the circuit court, that is, the judge, not the jury. See, for example, § 967.02(7), which provides [for the purposes of the Criminal Procedure Code]: "Court means the circuit court unless otherwise indicated." The Committee's conclusion that the reference is to the judge only and does not include the jury is consistent with the usual meaning given to "the court" and is faithful to the language of Act 94.

Act 94 had two parts: one relating to civil liability – § 895.62 – and one relating to the criminal law privilege of self-defense – § 939.48(1m). The civil and criminal provisions have roughly the same content, though they are not set up in exactly the same way. Section 895.62(3) is the civil equivalent of § 939.48(1m)(ar) and specifically refers to the "finder of fact":

> . . . the finder of fact may not consider whether the actor had an opportunity to flee or retreat before he or she used force and the actor is presumed to have reasonably believed that the force used was necessary to prevent imminent death or great bodily harm to himself or herself or to another person.

The legislature used the term "finder of fact" in the civil provision, which clearly includes both the judge in a case without a jury and

the jury. In the criminal provision that is part of the same act, the legislature used the term "court." Because Act 94 did not use "finder of fact" in the criminal provision, the Committee concluded that the reference to "the court" means the judge and does not include the jury.

- **"The court shall presume" does not affect the state's burden of persuasion.**

The usual effect of a "presumption" is to shift the burden of persuasion from one party to another. This is routinely done in civil cases. In criminal cases, the burden of persuasion is always on the state to prove all facts necessary to constitute the crime and this burden cannot be shifted to the defendant by use of a "presumption." With respect to the privilege of self-defense in Wisconsin, the burden is on the state to prove the privilege does not apply once the defendant meets the burden of production by showing "some evidence" of each aspect of the privilege. The basic problem the Committee confronted is: how do you give defendants the benefit of a presumption as to a specific part of the case when a) they bear no burden of persuasion with respect to establishing that part of the case, and, b) they already enjoy a presumption of innocence as to all aspects of the case?

A defendant has a "presumption of innocence." This means the defendant must be found not guilty unless the state proves beyond a reasonable doubt both that all the facts necessary to constitute the crime have been established and that any defense raised by the evidence has been disproved. For example, as applied to a first degree intentional homicide case, the state must prove that the defendant caused death with intent to kill [the "elements" of the crime], and, if there is "some evidence" of the

privilege of self-defense, that the defendant did not act lawfully in self-defense.

Given the structure of the existing privilege of self-defense, and given that Act 94 did not change that privilege, the Committee concluded that creating a "presumption" about a part of the definition of self-defense [namely, that the defendant reasonably believed deadly force was necessary] does not add anything to what the state is already required to prove. The state already has burden to disprove the privilege of self-defense [once the burden of production is met] and that burden cannot be increased by any presumption the court might employ. Thus, the Committee concluded, Act 94 does not create any new, alternative standard for the jury to consider and there is no reason to communicate the substance of the new rule to the jury.

- **"The court . . . shall presume" provides another way for the defendant to meet the burden of production.**

The Committee concluded that the requirement that "the court shall presume" should be implemented by applying it to the defendant's obligation to meet the burden of production on the privilege of self-defense. The complete privilege of self-defense as defined in § 939.48(1) is to be submitted to the jury when there is "some evidence" of the privilege. In a case that does not involve the new rule, the defendant must point to evidence that he or she reasonably believed the following:

- that there was an actual and imminent unlawful interference with the defendant's person; and,

> • that it was necessary to use force or threaten force to prevent or terminate the interference; and,
>
> • when deadly force is used, that it was necessary to prevent imminent death or great bodily harm to himself or herself.
>
> Once there is evidence tending to show these matters, the burden of persuasion is on the state to prove that the defendant's conduct did not meet the standard.
>
> The Committee concluded that under the new rule, the effect of "the court shall presume" is to provide the defendant with another way to meet the burden of production on self-defense. If there is evidence of the predicate facts under § 939.48(1m)(ar)1. or 2., the requirement that "the court shall presume" means that no additional evidence is required as to the issue of the defendant's reasonable belief that the force used was necessary to prevent imminent death or great bodily harm to himself or herself.
>
> Thus, under § 939.48 as amended by 2011 Wisconsin Act 94, there are two ways for a defendant to meet the burden of production on the privilege of self-defense:
>
> • by pointing to some evidence of each part of the definition of self-defense in sub. (1) of § 939.48; or,
>
> • by pointing to some evidence of the predicate facts set forth in sub. (1m)(ar)1. or 2., the provisions created by Act 94.
>
> The determination whether the facts meet the "some evidence" threshold is for the trial court as is the case in other situations involving defenses or mitigating factors.

Wis JI-Criminal 805A, pp. 5-7 (R-Ap. 107-09) (footnotes omitted; bracketed language in original).

Although Chew cites with approval the Committee's discussion of the new statute's "retreat" provision, *see* Chew's brief at 19, he ignores its discussion of the presumption of reasonableness, *see id*. at 20-22. Instead, he argues, based on the "plain meaning" of the statute, that the new statute creates a conclusive presumption of reasonableness that the jury must apply. *See id*. at 21-22. Chew contends that the jury should have been instructed that "if it finds the predicate facts occurred (basic facts) it must presume Mr. Chew reasonably believed force was necessary." *Id*. at 21. He further argues that "[t]he statute does not provide any way to rebut the presumption once the jury finds the predicate facts." *Id*.

The State notes that, contrary to Chew's assertion on appeal, *see* Chew's brief at 22, the jury instruction he requested did not include a conclusive presumption. Rather, after first reciting the traditional elements of self-defense, the proposed instruction addressed the jury's determination of whether the defendant's beliefs were reasonable (17:3; A-Ap. 116). Then, after setting forth the generally applicable standard for determining reasonableness – the standard that was given to the jury in this case (55:138-39) – the proposed instruction added the following language:

> The defendant is presumed to have acted reasonably in using force which is intended or likely to cause death or great bodily harm 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 building.

(17:3; A-Ap. 116.)

That proposed instruction did not request a conclusive presumption. "'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.'" *State v. Vick*, 104 Wis. 2d 678, 693, 312 N.W.2d 489 (1981) (quoting *Muller v. State*, 94 Wis. 2d 450, 475, 289 N.W.2d 570 (1980)). The instruction that Chew proposed would not have compelled the jury to find that Chew acted reasonably if it found the predicate facts. It would have instructed the jury to presume that he acted reasonably, but would not have prevented the jury from concluding, based on the trial evidence, that the presumption was overcome.

Under the facts of this case, the jury could readily have found that the presumption of reasonableness was overcome. In fact, because the jury was instructed that it was the State's burden to prove beyond a reasonable doubt that Chew did not act lawfully in self-defense – an instruction that, as the Jury Instruction Committee recognized, creates a presumption that the State must rebut beyond a reasonable doubt, *see* Wis JI-Criminal 850A, p. 6; R-Ap. 108, the jury *did* find that the presumption had been overcome.[3]

[3]The State acknowledges that the jury was given the standard instruction on retreat, which permitted the jury to consider Chew's opportunity to retreat when determining whether his beliefs were reasonable (55:139). Because the district attorney, in his closing argument, asked the jurors to consider the retreat instruction (55:176-77), the State will not argue that if this court determines that the trial

Chew was charged with reckless endangerment for shooting at two men who had forced their way into the apartment in which he was residing. Chew shot both of the men while they were in the apartment and hitting him. (54:146-47, 170; 55:68-69). He was not charged for those shootings (55:52, 147). Rather, he was charged with reckless endangerment for what happened next (*id.*).

After Chew shot the men, they ran out of the apartment and out of the apartment building (54:147). They were running away from the building, when Chew, who had left the apartment and was standing in or just outside the doorway of the apartment building, fired four more shots (54:147-48, 171-72; 55:93).[4] His shots missed the men, but two bullets struck a neighboring business about 150 feet from the apartment building's doorway and one bullet struck a nearby car (54:241, 247; 55:42-43). Chew testified that he fired those shots because he "didn't know if they were gonna go get another weapon from around the corner or not or if they were going to get more people" (55:70).

Chew's interpretation of the statute would require the jury to find that his belief that the men who had left the building and were running away posed an imminent threat and that shooting

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court should have given an instruction based on the new statute that the error was harmless.

[4]Police found four spent casings outside the apartment building, one of which was on the porch and the others near the porch (55:29). Ms. McCranie testified that she saw Chew firing from outside the building (54:139-40). Chew testified that he was standing in the doorway of the apartment building when he fired the shots (55:70, 93-94).

at them was necessary to protect himself was a reasonable belief. That is not a reasonable interpretation of the statute.

Interpreting the new statute to create a irrebuttable presumption of reasonableness could lead to truly absurd results. Suppose, for example, that an individual lives in a rural home with a long driveway. One day, while the individual is at home, he encounters an unarmed person in the foyer who has forced open the front door. He yells at the intruder to get out, and the intruder immediately runs out of the house. The homeowner, an experienced hunter, gets his rifle, walks out onto his porch, and fires a shot at the intruder, who by this point is 100 yards down the driveway and running away. The intruder is hit by the shot and dies.

The homeowner is charged with first-degree intentional homicide. At trial, he contends that he was acting in self-defense because (like Chew) he thought the intruder may have been going to get help or a weapon. He invokes the new statute because the intruder had forcibly and unlawfully enter his dwelling and because both the porch from which he shot and driveway down which the intruder was fleeing are, by definition, part of his dwelling. *See* Wis. Stat. § 895.07(1)(h).

If Chew's interpretation of the statute were correct, the jury in this hypothetical case would be instructed that there is a conclusive presumption – that is, that it *must* find – that the homeowner's belief that it was necessary to shoot the fleeing intruder to prevent an imminent lawful interference with his person was reasonable. Interpreting the statute to compel the jury to find that a defendant's beliefs were reasonable, no

matter how objectively unreasonable they are, turns a self-defense statute into a license to kill.[5]

"[S]tatutory 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 of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." *State ex rel. Kalal v. Circuit Court for Dane Cnty.,* 2004 WI 58, ¶46, 271 Wis. 2d 633, 681 N.W.2d 110. Section 939.48(1m) did create a new, freestanding defense. Rather, the new statute plays a role only if "the actor makes . . . a claim under sub. (1)," that is, under the existing self-defense statute. Construing the new statute to create an irrebuttable presumption of reasonableness no matter how objectively unreasonable the actor's beliefs were is an unreasonable reading of the new statute.

To support his contention that the new statute creates a mandatory presumption, Chew cites a Wisconsin Legislative Council memorandum that states that the new statute "creates a presumption of immunity for criminal actions involving force that is intended or likely to

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[5]In a first-degree intentional homicide case, defendant's unreasonable beliefs may support a claim of imperfect self-defense, which reduces the offense severity, but a claim of complete or perfect self-defense requires that the defendant's beliefs be reasonable. *See State v. Head*, 2002 WI 99, ¶90, 255 Wis. 2d 194, 648 N.W.2d 413, 434 ("If a defendant had an *actual* but unreasonable belief that she was in imminent danger of death or great bodily harm and an *actual* but unreasonable belief that the force she used was necessary to defend herself, the defendant may prevail on imperfect self-defense, but not perfect self-defense, because perfect self-defense requires objective reasonableness.").

cause death or great bodily harm." A-Ap. 118; *see* Chew's brief at 22. That memorandum says nothing, however, about whether the presumption is mandatory or permissive. A-Ap. 118-19.

Moreover, the memorandum inaccurately describes the portion of Act 94 relating to self-defense in a criminal case as creating a presumption of "immunity." A-Ap. 118. The civil liability section of Act 94 explicitly confers "immunity" from civil liability. *See* 2011 Wis. Act 94, § 1 (creating Wis. Stat. § 895.62(2)); R-Ap. 101-02. The criminal self-defense portion of the Act, in contrast, does not refer to "immunity" from criminal liability. *See* 2011 Wis. Act 94, § 2; R-Ap. 102.[6]

Chew also notes that the legislature rejected an amendment that would have deleted the "shall presume" language in favor of "a rebuttable presumption." *See* Chew's brief at 21. But it is difficult to read too much into that. The legislature may have rejected the amendment for a variety of reasons. It may have believed that the amendment was unnecessary. Or, because the amendment would have made two changes to the bill, *see* A-Ap. 121, the legislature might have rejected the amendment because it did not like the other change.

The State has discussed the impact of the new statute on the self-defense privilege because

[6]There is another notable differences between the civil and criminal provisions of Act 94. Unlike the Act's civil liability provision, which requires the "finder of fact" to apply a presumption of reasonableness, *see* Wis. Stat. § 895.62(3), the Act's criminal self-defense provision states that "the court" should apply that presumption, *see* Wis. Stat. § 939.48(1m)(ar).

this is the first appellate case arising under the statute and because it believes that Chew's interpretation of the statute is incorrect. However, this court need not decide whether Chew's reading of the new statute is correct. That is because, for the reasons discussed in the next section of this brief, Chew was not entitled to an instruction based on the new statute.

II. CHEW WAS NOT ENTITLED TO AN INSTRUCTION BASED ON WIS. STAT. § 939.48(1m) BECAUSE THERE WAS NO EVIDENCE OF AN UNLAWFUL ENTRY.

The trial court declined Chew's request for a jury instruction based on the new statute because it found that the statute did not apply in common areas of apartment buildings. The State does not believe that the language of the statute supports that construction. This court should affirm the trial court's ruling on a different ground, that Chew was not entitled to the instruction because the men who entered the apartment did so lawfully. *See State v. Smiter*, 2011 WI App 15, ¶9, 331 Wis. 2d 431, 793 N.W.2d 920 (court of appeals is "not constrained to the circuit court's reasoning in affirming or denying its order" and "may affirm the circuit court's order on different grounds").

Prior to trial, the court discussed self-defense and the new statute with the parties (53:23-36). The court said that it "tend[ed] to think the self-defense argument is viable" but that it "tend[ed] to also think that the castle doctrine is not viable" (53:31; A-Ap. 102). The court said that it was "skeptical" about the new statute's

applicability because it was not convinced that the entry was unlawful (53:33-34; A-Ap. 104-05). The court said that "if she [Cheryl McCranie] is the person who has the apartment -- I don't think there's any contest about that -- and she opens the door for these guys to come in, then it's a lawful entry as far as I'm concerned" (53:36; A-Ap. 107).

At the jury instruction conference held after the close of the evidence, Chew asked the court for an instruction based on the new statute (55:113). The district attorney argued that the statute did not apply because the entry was lawful (55:116-18).

The court said that it had not changed its prior decision on the jury instructions although it had "different reasons" (55:119; A-Ap. 109). The court found that there was sufficient evidence for self-defense to be presented to the jury (55:119-21; A-Ap. 109-11). The court ruled that the new statute did not apply based on the statutory definition of a "dwelling," which it interpreted to apply only to areas over which a person exercises control (55:121-23; A-Ap. 111-13).

A. The statutory definition of a "dwelling" does not exclude common areas of multi-unit residences.

As the State noted in its overview of the new statute, the statute defines "dwelling" by reference to the definition of a dwelling in Wis. Stat. § 895.07(1)(h). *See* Wis. Stat. § 939.48(1m)(a)1. Section 895.07(1)(h), in turn, defines "dwelling" as follows:

> (h) "Dwelling" means any premises or portion of a premises that is used as a home or a 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).

The trial court said that "the key . . . there is the portion of the premises" and that in the context of an apartment building, the apartment was the "portion of the dwelling" (55:121; A-Ap. 111). The court stated that "[w]hen the statute goes on to make reference to driveways, sidewalks, swimming pools, terraces, patios, fences, porches, garages, and basements, I interpret that to mean parts of a single family unit" (55:122; A-Ap. 112).

The court said that neither Chew nor Cheryl McCranie, who was the apartment's lessee (54:116; 55:76), had control over the doorway to the apartment building (55:122; A-Ap. 112). Rather, the court observed, that was an area that was "open to the public" (*id.*). "Because it's open to the public," the court stated, "if someone is going to assert the castle doctrine, they are also getting the presumption by law that they can use deadly force" (55:122-23; A-Ap. 112-13). Noting that "[t]he castle is ancient history," the court concluded that "if somebody is going to take their fight out into a public area, they should not have that presumption" because "that is not the purpose" of the castle doctrine (55:123; A-Ap. 113).

The trial court's reading of the areas in which the castle doctrine applies may be

consistent with the common law understanding of the doctrine in some states.[7] But while the new statute may be popularly referred to as the castle doctrine, the geographical scope of the common law castle doctrine is irrelevant because the statute provides its own definition of a "dwelling." The State agrees with Chew that there is nothing in that statutory definition that distinguishes between single-family homes and apartment buildings.

In the context of someone who lives in an apartment building, several of the areas specified in the statutory definition of a "dwelling," such as driveways, garages, sidewalks, and basements, are

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[7] *See, e.g., Gainer v. State*, 391 A.2d 856, 860-61 (Md. Ct. Spec. App. 1978) ("Premised on the common law principle that a man's home is his castle, indeed his ultimate sanctuary, the castle doctrine permits a person who is without fault and is attacked within his dwelling or its curtilage, to stand his ground and defend himself, even if a retreat could be safely accomplished") (footnotes omitted); *but see People v. Riddle*, 649 N.W.2d 30, 44 (Mich. 2002) ("while the castle doctrine applies to all areas of a dwelling – be it a room within the building, a basement or attic, or an attached appurtenance such as a garage, porch or deck – it does *not* apply to open areas in the curtilage that are not a part of a dwelling"). In the only case that the State has found addressing the application of the castle doctrine to areas of an apartment building other than the apartment itself, the South Carolina Court of Appeals held that the castle doctrine did not apply to the public sidewalk outside the building because "[t]he common denominator between these places that are considered curtilage" to which the doctrine applies "is they are places where the property owner alone has the right to be, to the exclusion of the general public." *State v. Dickey*, 380 S.C. 384, 395-96, 669 S.E.2d 917, 923 (Ct. App. 2008), *rev'd*, 716 S.E.2d 97 (2011). However, in its decision reversing the court of appeals, the South Carolina Supreme Court found it unnecessary "to determine whether curtilage can extend to a public sidewalk." 716 S.E.2d at 103.

"common areas." Because there is no basis in the statutory language for concluding that sidewalks, garages, basements, driveways and other areas expressly included in the definition of a "dwelling" are only covered by the statute when the actor lives in a single family residence, the State disagrees with the trial court's reading of the statute to require that a person be able to exercise control over an area as a limitation on the applicability of the statute.

B. The statute does not apply in this case because there was no evidence of an unlawful entry.

The new statute applies only when the person against whom force was used either "was in the process of unlawfully and forcibly entering the actor's dwelling, . . . , the actor was present in the dwelling, . . . and the actor knew or reasonably believed that an unlawful and forcible entry was occurring," Wis. Stat. § 939.48(1m)(ar)1., or "was in the actor's dwelling . . . after unlawfully and forcibly entering it, the actor was present in the dwelling, . . . and the actor knew or reasonably believed that the person had unlawfully and forcibly entered the dwelling, motor vehicle, or place of business." Wis. Stat. § 939.48(1m)(ar)2. Under either of those provisions, two conditions must be met with respect to the entry: 1) it must have been unlawful and forcible; and 2) the actor must have known or reasonably believed that the entry was unlawful and forcible.

As Chew correctly observes, *see* Chew's brief at 13, the "some evidence" standard is applied when determining whether a defendant is entitled

to a jury instruction on self-defense. *State v. Peters*, 2002 WI App 243, ¶21, 258 Wis. 2d 148, 653 N.W.2d 300. That standard was not met in this case because there was no evidence introduced at trial that showed that Andreaius Lucas or Andrew Lee entered the apartment unlawfully. To the contrary, Cheryl McCranie testified that she "had told Andreaius and Andrew beforehand if anything -- you guys have full permission to come into my apartment if I need help" (54:121). Ms. McCranie further testified that as she was struggling with Chew in the apartment, she "managed to use my right hand to unlock the door and open it a little bit to the point where Andrew and Andreaius could see me. And they saw him grabbing me and trying to pull me backwards. That's when they proceeded into my house because I had given them permission before if I needed help they could" (54:123).

Mr. Lee and Mr. Lucas testified that they had not spoken with Ms. McCranie ahead of time about going into the apartment (54:157, 179). However, Lee testified that as he and Lucas were standing outside the apartment door, McCranie "unlocked it and opened it like she wanted us to come in" (54:158). They went in, he testified, when Chew forced the door closed after McCranie had opened it (*id.*). Lucas testified that when he and Lee were in the hallway, Lee called to McCranie to ask her to unlock the door so she could come out (54:167-68). According to Lucas, they went in after "he [Lee] asked her that, the door unlocked and it slammed shut real hard, and then he called again, and that's when it unlocked" (54:168).

Although the trial testimony differed with respect to what McCranie told the men ahead of time, there was no factual dispute at trial with

regard to whether McCranie consented to the men entering her apartment. Regardless of when, how, or even whether she *communicated* her consent to the men, it was undisputed that she did, in fact, consent to their entry. Because she consented to the entry, the entry was not unlawful.

The self-defense statute defines "unlawful" to mean "either tortious or expressly prohibited by criminal law or both." Wis. Stat. § 938.48(6). Because the two men had permission from Ms. McCranie, who was the person who had rented the apartment (54:116), their entry was neither tortious nor prohibited by criminal law.

Under Wisconsin tort law, a trespasser is "a person who enters or remains upon land in the possession of another without a privilege to do so created by the possessor's consent or otherwise." *Antoniewicz v. Reszczynski,* 70 Wis. 2d 836, 843, 236 N.W.2d 1 (1975) (adopting the *Restatement (Second) of Torts* § 329 definition of trespasser); *see also Hofflander v. St. Catherine's Hosp., Inc.*, 2003 WI 77, ¶105, 262 Wis. 2d 539, 664 N.W.2d 545. As the tenant on the apartment lease (54:116; 55:76), Ms. McCranie was the apartment's possessor. *See* Wis. Stat. § 704.05(2) (tenant has "the exclusive right to possession of the premises during the term of the lease"). Because Mr. Lucas and Mr. Lee entered the apartment with the possessor's consent, their entry was not tortious.

Nor was their entry prohibited by the criminal law. The criminal trespass to dwellings statute provides that "[w]hoever intentionally enters the dwelling of another without the consent of some person lawfully upon the premises, under circumstances tending to create or provoke a breach of the peace, is guilty of a Class A

misdemeanor." Wis. Stat. § 943.14. Mr. Lucas and Mr. Lee did not violate that statute because they had the consent of a "person lawfully upon the premises" – Ms. McCranie.

Chew argues that the men's entry was unlawful and forcible because they were strangers to him, because he "had no idea they were associated with Ms. McCranie," and because "[h]e only knew that two strange men forced their way into his apartment and violently attacked him. . . ." Chew's brief at 15. Those facts are relevant to whether Chew reasonably believed the men unlawfully entered the apartment. But the statute requires more than the actor's reasonable belief. It also requires that the entry (or attempted entry) actually be unlawful. The only evidence at trial on that point established that the entry was lawful because Ms. McCranie consented to the entry.

Chew argues that the trial court "tacitly acknowledg[ed]" that the entry was unlawful and forcible because, after hearing the trial evidence, "it changed its mind about the reasons it gave at the previous hearing" with respect to why it would not give an instruction based on the castle doctrine. Chew's brief at 15. "In other words," he writes, "it no longer believed there was insufficient evidence that the entry was unlawful and forcible." *Id*.

That argument fails as a matter of logic. The fact that the court ultimately did not base its decision on whether the entry was lawful does not mean that it implicitly found that the entry was unlawful. When it decided not to give the castle doctrine instruction, the court said nothing whatsoever about whether the entry was lawful

(55:121-23; A-Ap. 111-13). That the court chose to base its ruling on one rationale does not mean that it rejected the other. All that can be said is that the court, having rejected the castle doctrine instruction based on the statutory definition of a dwelling, found it unnecessary to decide whether the entry was lawful.

More importantly, Chew has not identified any evidence in the record that would support a finding that the men's entry into the apartment was unlawful. He was not entitled, therefore, to a jury instruction based on the castle doctrine.

CONCLUSION

For the reasons stated above, the court should affirm the judgment of conviction and the order denying postconviction relief.

Dated this 1st day of April, 2014.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 7,240 words.

_____
Jeffrey J. Kassel
Assistant Attorney General

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I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of 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 1st day of April, 2014.

_____
Jeffrey J. Kassel
Assistant Attorney General

STATE OF WISCONSIN

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

DISTRICT II

Case No. 2013AP2592-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

SUPPLEMENTAL APPENDIX OF PLAINTIFF-RESPONDENT

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INDEX TO APPENDIX

APPENDIX CERTIFICATION

I hereby certify pursuant to Wis. Stat. § (Rule) 809.19(3)(b) 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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Jeffrey J. Kassel
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