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

REPLY BRIEF OF DEFENDANT-APPELLANT

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TABLE OF CONTENTS

CASES CITED

CONSTITUTIONAL PROVISIONS AND STATUTES CITED

OTHER AUTHORITIES CITED

ARGUMENT

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

The state agrees with the following aspects of Chew's arguments: (1) the circuit court's reasoning for refusing to give the requested instruction – that the statute does not apply to apartment buildings – was incorrect (State's Brief, 21-23); (2) if the castle doctrine applies then the jury instruction must change regarding the defendant's duty to retreat (Id. at 6-7); (3) the "some evidence" standard is applied when determining whether a defendant is entitled to the new instruction (Id. at 24-25); and (4) if this court concludes the circuit court should have given an instruction related to the castle doctrine, then the error was not harmless. (Id. at 15, fn. 3).

The state disagrees with Chew on two issues. First, the state does not agree the castle doctrine applies in Chew's case, and second, the state does not agree that when the castle doctrine applies, the jury should be told about the presumption of reasonableness. These issues will be addressed individually.

A. Application of Castle Doctrine.

The state argues the castle doctrine does not apply here for one reason: there is no evidence Chew's assailants entered his home unlawfully because McCranie consented to the entry. (State's Brief, 25). However, the state agrees that if this court concludes there was "some evidence" of an unlawful entry, then Chew is entitled to a new trial with a different

self-defense instruction.[1] The state's argument that the castle doctrine does not apply here fails for several reasons.

It is important to remember that the "some evidence" standard is a low threshold and the evidence must be viewed most favorably to the defendant. ***State v. Schmidt***, 2012 WI App 113, ¶ 12, 344 Wis. 2d 336, 824 N.W.2d 839. 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. Accordingly, as the state agrees, if there is "some evidence" that Lee and Lucas's entry was unlawful, then Chew should be granted a new trial where the court gives the jury an instruction related to the castle doctrine.

First, McCranie no longer lived at the apartment and therefore she did not have the ability to consent to someone else's entry. She had been staying with her parents. (54:116). Her new boyfriend, Lee, moved into her parents' home with her. (54:132). Therefore, at the time of Chew's assault, Chew was the only person living at the apartment. Although her name was on the lease, it was not her dwelling. *See* ***State v. Carls***, 186 Wis. 2d 533, 521 N.W.2d 181 (Ct. App. 1994) (finding the home the defendant owned with his wife was not his dwelling for purposes of the trespass statute because he no longer lived there). Since McCranie no longer lived at the apartment it was not her dwelling and she could not consent to Lee and Lucas entering the apartment. Chew forcibly tried to keep them from entering so there is no question the entry was unlawful.

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[1] The state agrees the castle doctrine changes the self-defense instruction regarding retreat. However, as will be discussed below, the parties disagree about whether the jury should be instructed on the presumption language.

Second, even if she was allowed to consent, the entry still was not lawful. In this context, "unlawful means either tortious or expressly prohibited by criminal law or both." Wis. Stat. § 939.48(6). There is no dispute that both of the men who entered Chew's home and attacked him committed crimes. The state charged both Lee and Lucas with substantial battery, which they plead down to disorderly conduct. (54:152-53, 174). There is at minimum "some evidence" that the men entered with this criminal intent.

Chew testified that McCranie unlocked the door (for the second time) and Chew began to lock it again when two men "pushed in the door." (55:63). They "shoved it open" and came into the apartment. (Id.) Chew explained the entry as follows: "I tried to push the door closed when I felt the door, like, trying to be forced open. And I couldn't. It was, you know – I ended up backing away from the door." (Id.) Then the men came into the apartment. (Id.) Chew never saw either man before and he was terrified. (55:64). The men ran in swinging. (Id.) Chew was hit in the head with an object which is what made him back off the door quicker. (55:64-65).

There was no break between the entry and the assault. The men immediately chased Chew to the bedroom and began beating him, breaking his ribs and nose. (55:64-66, 75). As Chew ran to the bedroom, his assailants repeatedly hit him. (55:66). There is no doubt Chew did not consent to the men's entry into his home.

McCranie never testified she gave the men permission to enter for an unlawful purpose. Rather, she testified she gave the two men permission to enter if she needed help. (55:25). However, the men did not enter and immediately help McCranie. Instead, both men entered and immediately

attacked Chew, without checking on McCranie. If the men were truly there to help McCranie they could have easily left with her, without attacking Chew. That did not happen. There is no evidence Chew's assailants had consent to enter Chew's home to commit a crime, and thus, the entry was unlawful.

Additionally, Chew testified he did not stop her from leaving. (55:78). Looking at the evidence most favorable to Chew, the men did not need to enter to help McCranie because she could have left. Regardless, they did not enter and protect McCranie. They entered and unnecessarily attacked Chew, as evidenced by their convictions.

Finally, the state attempts to diminish the significance of the court's findings on this issue. The circuit court initially was not convinced the assailant's entry was unlawful. (53:34). It stated, "I am not going to let [the castle doctrine instruction] go to the jury unless I'm convinced it was an unlawful and forcible entry. I am not convinced that it was unlawful." (Id.) However, after hearing the evidence at trial the court concluded "the reasons I stated [at the motion hearing], to be honest, I actually came to change my mind about them." (55:121). Meaning, the court believed there was at least some evidence that the entry was unlawful. However, the court denied the request for the instruction on different grounds.

The state argues the court's choice to base its ruling on one rationale (inapplicability to apartment buildings) "does not mean that it rejected the other" (the entry was lawful). (State's Brief, 28). The state goes on to argue the court's decision based on its interpretation of dwelling only means it found it unnecessary to decide whether the entry was lawful. (Id.) That would be true if the court was silent about its previous decision, but that is not the case. The court did not

simply deny the request based on its interpretation of dwelling and stand silent about its previous comments concerning the unlawful entry. Instead, the court stated, "I actually came to change my mind about [its previous reasons]." (55:121; App. 121). At the motion hearing the court stated it was not convinced the entry was unlawful. (53:34; App. 105). It then changed its mind after hearing the evidence, which means it now considered the entry unlawful.

Again, the state agrees Chew only needs to show "some evidence" of an unlawful entry. (State's Brief, 24-25). Here, there is more than "some evidence" that Chew's assailants entered unlawfully. Therefore, he is entitled to a new trial with a jury instruction related to the castle doctrine.

B. Presumption of Reasonableness.

The state agrees that the standard self-defense jury instruction must be altered when the castle doctrine applies. It concedes the new instruction must inform the jury that it cannot consider whether the defendant had an opportunity to retreat. (State's Brief, 6-7). The state also agrees if this court determines the circuit court erred by not instructing the jury on the castle doctrine - meaning there is some evidence the entry was unlawful - then the error cannot be considered harmless and Chew is entitled to a new trial. (Id. at 15, fn. 3).

However, the state argues if the castle doctrine applies the circuit court should not inform the jury about the second part of the legislation, the presumption of reasonableness. This argument does not impact whether Chew gets a new trial. It only impacts what the instruction would be if he got a new trial.

The state argues the presumption of reasonableness is simply another way for the defendant to get the standard self-defense jury instruction. This interpretation renders the law superfluous and does not fulfill the legislature's intent. At minimum, the presumption of reasonableness language should be included in the instruction given to the jury, as trial counsel requested here.[2]

The legislature chose "shall presume" for a reason. The language should have some impact on the proceedings, other than simply impacting the burden of production. It explains a circumstance where it must be presumed the defendant acted reasonably. In a way, it defines what reasonable means under certain facts, further informing the jury about the law. It is a legal fiction to say the presumption language does not add to the instruction. Thus, even if the court concludes the presumption is not conclusive, it should still be explained to the jury.

In making its argument, the state adopted the interpretation by the Criminal Jury Instructions Committee to support its conclusion that the "shall presume" language is simply another way for a defendant to get the standard self-defense instruction. Although the Committee's interpretation can be used for persuasive value, it is not binding and reviewing courts have concluded use of an instruction drafted by the Committee was error. *See* ***State v. Austin***, 2013 WI App 96, 349 Wis. 2d 744, 836 N.W.2d 833 (concluding the jury instruction for self-defense as it relates to

[2] Trial counsel requested an instruction that stated "[t]he defendant is presumed…" but an instruction could also state the jury "shall presume" the defendant acted reasonably if the predicate facts are met. Both properly inform the jury about the presumption.

recklessly endangering safety improperly implied the defendant must satisfy he was acting in self-defense).

Here, the Committee impliedly acknowledged differing opinions about the law's analysis when it stated "[t]he Committee realizes that this approach differs from what some may believe to be the impact of the new rule. However, the Committee believes that this approach is the one that is most faithful to the statutory language." Wis. JI-Criminal 805A, p. 5.

Under the Committee's interpretation, and thereby the states's interpretation, the jury will never hear about the presumption of reasonableness even though the legislation unequivocally states the court "shall presume" the defendant acted reasonably if the predicate facts are met. Wis. Stat. § 939.48(1m)(ar). Still, both agree the instruction should be changed regarding the duty to retreat which is referred to in the same sentence. This interpretation is internally inconsistent and significantly guts the new legislation of its intent.

The Committee cites to the new rule where it states "the actor makes … a claim under sub. (1)," to argue the new rule is tied to the existing self-defense privilege and does not create an alternative to the privilege. Wis. JI-Criminal 805A, p. 5. Yet, the Committee later states - and the state agrees - the privilege is altered because if the castle doctrine applies the jury cannot consider whether there was an opportunity for retreat. Therefore the instruction must change accordingly.

There is no reason why the instruction would change as to the duty to retreat, but not as to the presumption of reasonableness. After all, the retreat language and the presumption language are in the same sentence, "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…" Wis. Stat. § 939.48(1m)(ar) (emphasis added). It is illogical for the first mandate to impact what the jury is told but not the second.

The Committee also concludes the new rule only affects what a defendant must show to have the privilege submitted to the jury. (*See* State's Brief, 9-13; Wis. JI-Criminal 805A, IIB, p. 7-8). In other words, it simply provides another way for the defendant to get a self-defense instruction. To get to this conclusion, the Committee decided the use of the term "court" meant the trial judge and not the jury, and therefore, the reasonableness presumption would not be explained to the jury. Wis. JI-Criminal 805A, IIB, p. 7-8. If that were true, then the jury would not be instructed regarding the changes to the duty to retreat. As the Committee realizes that is not possible because consideration of the defendant's opportunity to retreat when the castle doctrine applies directly conflicts with the consideration of retreat under the standard self-defense instruction. *See* Wis. JI-Criminal 810. It would be consistent and logical for the jury to be told about the retreat *and* presumption of reasonableness language.

With regard to the burden of persuasion, the Committee acknowledges "[t]he basic problem [it] 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?" Wis. JI-Criminal 805A, p. 6. The Committee concluded the presumption does not add anything because the state already has the burden of proof and the defendant has the presumption of innocence. (Id. at 7).

This interpretation is wrong because the presumption language does add to the jury instruction. It tells the jury that after making certain factual findings, it shall presume the defendant acted reasonably. It informs the jury about a circumstance where the defendant's actions *are* reasonable. In other words, it defines reasonable in a certain circumstance.

Trial counsel proposed the following addition to the self-defense instruction related to the presumption of reasonableness:

> 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 dwelling.

(17:3; App. 116). This language further assists the jury in applying the law the legislature enacted. The Committee's accompanying conclusion that the "shall presume" language simply provides another way for the defendant to get a self-defense instruction is superfluous. Practically speaking, it would be difficult to envision a circumstance where the defendant would not get a self-defense instruction, under the standard privilege, when he acted after someone unlawfully and forcibly entered his home. The Committee's interpretation hampers the clear legislative intent of the law.

After adopting the Committee's interpretation of the law, the state goes on to argue the presumption is not conclusive. It asserts the language requested by trial counsel would have been rebuttable, in that the jury could conclude, based on the trial evidence, that the presumption was overcome.

The state's argument on this issue is factual. It argues based on the facts of this case the jury *did* rebut the presumption, even though it was never told about the presumption. It is impossible for the jury to rebut a presumption it was never told about. The state's argument only works if the presumption language adds nothing, as the Committee suggests. As explained above, that rationale is wrong. Thus, even if this court concludes it is a rebuttable presumption, the presumption should still be included in the jury instruction. Without it, the jury cannot decide whether the presumption should be rebutted.

With regard to whether the presumption is conclusive or rebuttable, the state provides a hypothetical and argues an irrebuttable presumption would lead to absurd results. Essentially, the state argues the presumption should be rebuttable because the intruder may try to flee after unlawfully entering someone's home, and in that circumstance the jury should be able to conclude the defendant did not act reasonably. As explained in Chew's brief-in-chief, the legislature considered whether to call the presumption rebuttable and rejected it. Assembly Amendment 5, to Assembly Substitute Amendment 3, to 2011 Assembly Bill 69; App. 121.[3] Instead, it *chose* the mandatory language, "shall presume." The use of the term "immunity from criminal liability" in the Legislative Council Act Memo further confirms the new legislation does more than provide another way for the defendant to receive a self-defense instruction, it creates a presumption of reasonableness that must be explained to the jury. Legislative Council Act Memo, 2011 Wisconsin Act 94 (Dec. 13, 2011); App. 118.

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

Regardless, even if the presumption is not conclusive, it still should have been explained to the jury. The jury should have had the opportunity to weigh the evidence in light of the legislature's addition to the self-defense law, including the presumption language. However, as the state concedes, even if this court concludes the presumption language should not be included, Chew is still entitled to a new trial if this court concludes there is "some evidence" the entry was unlawful.

CONCLUSION

For all of the reasons stated above, Chew respectfully requests that the court reverse his conviction and order a new trial. If the court concludes the jury instruction should not include the presumption language Chew still requests a new trial with an instruction explaining the changes to the retreat language.

Dated this 21st day of April, 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 2,996 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 21st day of April, 2014.

Signed:

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