STATE OF WISCONSIN

COURT OF APPEALS, DISTRICT I

Case No. 2019AP806

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KAPRISHA E. GREER,

Defendant-Appellant.

Appeal of a Written Decision and Final Order Entered April 15, 2019 in Milwaukee County Circuit Court Case No. 17CM1386, Denying Motion for Post-Conviction Relief,
Circuit Court Michael J. Hanrahan, Presiding

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUE PRESENTED FOR REVIEW

Did the circuit court err by not including Wis JI Criminal-1900's "true threat" instruction to the jury, when the prosecution deliberately highlighted, both in its arguments and in prosecution witness JDH's testimony, that Kaprisha Greer had been disorderly by making a "true threat" to harm JDH?

The circuit court concluded on post-conviction motion that any error had been waived, and that if there was an error, it was harmless.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Appellant Kaprisha Greer does not request oral argument because, consistent with Wis. Stat. (Rule) § 809.22(2)(b), the written arguments can fully develop the theories and legal authorities on each side so that oral argument would be of marginal value.

Publication is not permitted under Wis. Stat. (Rule) § 809.23(b)4 because this is a single-judge appeal.

STATEMENT OF THE CASE

In Case No. 17CM1386 Greer was charged with endangering the safety of JDH by negligent operation of a

vehicle, and with domestic-abuse, disorderly conduct. Later, she was charged with bail jumping in Case No. 18CM513. The cases were consolidated and tried to a jury, which found the defendant guilty of disorderly conduct, but it acquitted her of the two other charges. On June 12, 2018, the court sentenced the defendant to 90 days in the House of Correction, stayed that time and placed her on probation for one year with imposed stayed condition time.

STATEMENT OF FACTS

The criminal complaint charged that Ms. Greer's conduct involved seven alternative modes of conduct, by alleging that she was either (1) violent, or (2) abusive, or (3) indecent, or (4) profane, or (5) boisterous, or (6) unreasonably loud, or (7) otherwise disorderly. Before any witnesses testified, the court noted the references to alternative modes of qualifying conduct in the disorderly conduct instruction (WI Jl-Criminal 1900) (which included "otherwise disorderly conduct') and asked the State if any of the alternatives could be omitted from the court's preliminary jury instructions. The prosecutor stated that "indecent" could be stricken, but he thought that there was a basis for the others. He also stated that there were no threat allegations, so that he would not ask that

the "true threat" paragraph be read from the disorderly conduct instruction.[1] Consequently, the court did not give the "true threat" instruction during its preliminary or final jury instructions.

The State's evidence showed that while JDH, the father of Greer's ten year-old daughter, was parking his car at his home on North 31st Street, Milwaukee, on the evening of April 28, 2017, Ms. Greer drove up, exited her car, complained about their child not being able to call her. She proceeded to smack, or try to hit, JDH with her hands while he was recording her conduct on his cellphone. (A. App. 1) She went back to her car and drove towards JDH, glancing his leg, to which he responded by punching and breaking her windshield. (Transcript of Jury Trial June 4, 2018 at pages 91-95). Greer denied striking or attempting to strike JDH with her car, although she admitted telling him just before got into the car,

[1] Where the State's case relies on statements or conduct that may constitute a threat, the threat must be a "true threat." WI Jl-Criminal 1900. The "true threat" instruction reads:
"A 'threat' is an expression of intention to do harm and may be communicated orally, in writing, or by conduct. This requires a true threat. 'True threat' means that a reasonable person making the threat would foresee that a reasonable person would interpret the threat as a serious expression of intent to do harm. It is not necessary that the person making the threat have the ability to carry out the threat. You must consider all the circumstances in determining whether a threat is a true threat."

"I got something for you."

During the State's cross-examination of Ms. Greer (Transcript of Jury Trial June 5, 2018 at pages 27-28), she agreed that she was yelling loudly and was boisterous, but she did not agree that she was violent when she slapped the smartphone from his hand; she said the video did not show how she had been provoked ("People never see when you're provoked, you only see the reaction for a reason.") The recording had stopped before Greer's vehicle glanced JDH, so that incident also was not captured on video.

The prosecution argued to the jury that there was sufficient evidence of disorderly conduct (Transcript of June 5, 2018 Jury Trial at page 55):

> The second count that the defendant has been charged with is disorderly conduct. This is one the defendant admits to. She said she was loud. She said she was boisterous. She agreed that slapping someone, slapping something out of their hand is violent. The defendant was behaving violently, abusively, boisterously, unreasonably loud.
>
> The second element of this is whether it caused or provoked a disturbance. It doesn't actually have to cause one. It's just the sort of thing that can, and yes, she admits this is a residential area. [JDH] lives there. Their child lives there. There's homes. It's not okay to be violent and unreasonably loud at 9:00 at night in a residential area. This is exactly the sort of thing that can cause a disturbance.

The defense argued that disorderly conduct did not

occur, under the specific circumstances, because JDH had frustrated Ms. Greer's ability to communicate with their daughter (Id. at page 59):

> And so on April 28th, 2018, they're in a custody dispute and he's playing games again. He has all this power and control over her, and he knows how to use it. So he blocks her number and he plays games, and she's trying to see her daughter and she can't get ahold of him. And so she's driving home and she sees his car, and she finally gets a chance to talk to him about why she hasn't seen her daughter.
>
> And you saw the video. What is the first thing that Kaprisha says? "I have not seen my daughter in two weeks. I have not heard from my daughter in two weeks." She's desperate, and she's upset. She's upset because he blocked her number and she can't see her kid. She's upset because he stopped letting her child talk to her. She's upset because he got her pregnant when she was 13 years' old.

The defense also argued that JDH deliberately provoked a confrontation, leading to Ms. Greer knocking the smartphone from his hand "that he's putting in her face," and that he had consented to her driving to hit him (Id. at 59-60):

> Mr. H[] knows how to play with her. He knows how to play these games. He calls her a "little hood ass" in the video. He tells her she "ain't shit." You heard the video. He says, "you're not going to do shit." He's goading her on. He says, "Hit me. Hit me. Hit me." He says, "Hit me with your car."[2]

[2] Defense counsel's argument drew upon JDH's admission (Transcript of Jury Trial June 4, 2017 at page 95) that he taunted Greer to hit him and his admission (at page 98) that he used derogatory and profane words towards her.

ARGUMENT

THE CIRCUIT COURT ERRONEOUSLY OMITTED THE "TRUE THREAT" JURY INSTRUCTION THAT IS REQUIRED BY WIS JI–CRIMINAL 1900.

Greer's postconviction motion (R. 64) challenged the circuit court's omission of a "true threat" jury instruction because of the prosecution's misrepresentation that it did not intend to pursue a "true threat" charge of disorderly conduct.

The circuit court denied Greer's motion (A. App. 101-107), listing three major reasons for its ruling. First, it agreed with the prosecution that defense counsel did not raise an objection during the instructions conference or request that the "true threat" instruction be added, so that he waived any error that may have resulted from not including the "true threat" instruction. (A. App. at 104).[3] Second, it found that the State did not rely on a "true threat" as an alternative theory of prosecution on the disorderly conduct charge, and therefore, the instruction did not need to be given. (A. App. at 104).[4]

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[3] "The State's waiver argument is legally correct. "Failure to object at the [jury instructions] conference constitutes a waiver of any error in the proposed instructions or verdict." § 805.13(3), Stats. See also *State v. Perkins*, 243 Wis. 2d 141, 149 (2001)."

[4] "Although some threat evidence was elicited during the trial, the State did not rely upon a "true threat" theory of prosecution. This is plainly evident from the State's closing

Third, the court ruled that the omission, if error, was harmless.[5] (A. App. 5).

A. The instruction error was reviewable even if waived.

The circuit court erroneously found that any instruction error had been waived. Wisconsin cases point out that an instruction error should be addressed, and should not be deemed waived, where the omitted instruction either taints the jury's factfinding process or prejudices the substantial rights of the defendant. See, *State v. Hatch*, 144 Wis. 2d 810, 824, 425 N.W.2d 27 (Ct. App 1988) (when a jury instruction error confuses the jury in a manner that goes to the integrity of the

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> argument . . . and its rebuttal argument. . . . Thus, without any argument by the State that the defendant's statement was an act of disorderly conduct, the "true threat" instruction was not necessary."

[5] "The "true threat" paragraph allows a jury to conclude that a potentially threatening statement is not a "true threat" when "a reasonable person making the threat would foresee that a reasonable person would [not] interpret the threat as a serious expression of intent to do harm." In this case, the defendant made the statement "I got something for you" immediately prior to driving her car directly at the victim. With her car, the defendant clearly had the ability to make good on the threat. Also, prior to making the statement, the evidence showed the defendant to be highly agitated and angry. Here, the defense does not explain how defendant's statement could not be interpreted as "serious expression of intent to do harm."

fact-finding process, discretionary reversal is warranted even though defense counsel did not object); *State v. Paulson* 106 Wis.2d 96, 315 N.W.2d 350 (1982) (otherwise waived jury instruction error should be reviewed when the error is so plain or fundamental as to affect the defendant's substantial rights).

The integrity of the jury's guilty finding had to have been compromised when, contrary to its pretrial declaration, the prosecution launched into a line of testimony with JDH that accused Greer of making a "true threat" at him. Then the jury was allowed to base its verdict on the "otherwise disorderly" mode of committing the offense, based on a confusion and entanglement that arose from the testimony that Greer made a "true threat." In *State v. A.S.*, 2001 WI 48, ¶¶ 5-8, 243 Wis.2d 173, 626 N.W.2d 712, the Supreme Court noted that "true threat" conduct falls within the rubric of the "otherwise disorderly conduct" element in Wis. Stat. § 947.01:

> We conclude that under these circumstances such conduct supports a finding of probable cause of "otherwise disorderly" conduct. Such violent threats are of the type that tend to disrupt good order under the circumstances because they could cause the listeners to be seriously concerned about the safety of those threatened.

A.S., 2001 WI 48 at ¶ 34, 243 Wis.2d 173, 626 N.W.2d 712.

Further, Greer's substantial rights were affected because the omission of a "true threat" instruction put her at

risk of conviction for having engaged in verbal conduct protected by the First Amendment –- a risk that could have been avoided had the "true threat" instruction been included. It was that very risk that led the Court in *State v. Perkins*, 2001 WI 46, ¶ 12, 243 Wis.2d 141, 149, 626 N.W.2d 762, 766 to rule that the jury instruction relating to the charged crime was constitutionally flawed, for failing to shield Perkins from a conviction based on constitutionally protected speech. *Perkins* held that the jury instruction was inadequate, and that the real controversy had not been fully tried and that the defendant therefore was entitled to a new trial.

Without an instruction relating to the evidence elicited by the prosecution, reversible error resulted, despite the absence of a requested instruction from the defense. That was the precise holding in *Perkins*, that also dealt with the need for a "true threat" jury instruction.[6] "[T]his court may reverse a

[6] A difference between the facts in *Perkins* and the instant case is that Perkins was expressly charged with the offense of making a threat to a judge, and the "true threat" instruction had not been given; whereas, here, the prosecution represented prior to trial that its theory of the disorderly conduct charge did not involve the making of a threat, but it then proceeded to bolster its alternative theory of "otherwise disorderly conduct" in the case by expressly asking JDH if Greer had made a threat. Comment 1 to Wis JI-Criminal 1900 states that "it is proper to instruct *on all alternatives that are supported by the evidence*."

conviction based on a jury instruction regardless of whether an objection was made, when the instruction obfuscates the real issue or arguably caused the real controversy not to be fully tried." Justice Wilcox, in his concurring opinion at ¶ 55, explained that it is not permissible to apply the harmless error analysis in these situations. "As explained above, *where jury instructions are devoid of explanation regarding an element of an alleged offense*, . . . there can be no jury verdict on that particular element and, therefore, harmless error analysis—which analyzes cases in terms of the jury verdict—is inapplicable." Here, the jury never considered under the *Perkins* test whether there was proof beyond a reasonable doubt that Ms. Greer's statements, that the prosecution contended were truly threatening, constituted "otherwise disorderly" conduct.

B. The prosecution did rely on the threat evidence to prove its case.

Before any witnesses testified, the State notified the Court and defense counsel that it would not be contending that Greer's conduct involved threats to harm or injure JDH. The prosecution strategically removed the "true threat" theory of disorderly conduct from its view of the offense. The

prosecution's request resulted in the Court not instructing the jury (both at the outset[7] and at the conclusion of trial[8]) about the First Amendment-based, "true threat" portion of the standard jury instruction for disorderly conduct (Wis JI-Criminal 1900).

> THE COURT: Okay. That's fine. We'll talk about it further. Just for the preliminary instruction, I will strike out indecent, and there is no threats
> there, any threat allegation, Mr. Flynn?
> MR. FLYNN: No.
> THE COURT: This is the instruction paragraph under disorderly conduct. "A threat is an expression of an intention to do harm, and may be communicated orally, in writing or by conduct," et cetera.
> MR. FLYNN: I guess I won't ask for the threat instruction.
> THE COURT: Okay. And I think that's it.

(Transcript of Jury Trial June 4, 2018 at pages 54-55).

Once testimony began, however, the State pointedly asked JDH the following (Id. at page 91):

> Q: *Did she threaten you*?
>
> A: I mean, yeah, the whole video is basically her threatening me and trying to hit me.

(Emphasis added.)

This caused defense counsel to challenge JDH about whether a verbal threat had been made (id. at page 98):

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[7] Transcript of Jury Trial June 4, 2017 at pages 65-66.
[8] Transcript of Jury Trial June 5, 2017 at pages 43-44.

> Q: And you stated that she was threatening you?
>
> A: Yeah.
>
> Q: She made verbal threats to you?
>
> A: I mean, when she was going to the vehicle, you can clearly hear her saying "I got something for you." I took that as a threat.

Wis JI-Criminal 1900 uses bold typeface to make it clear that the jury must be instructed in a particular fashion "where the state's case *relies on statements or conduct that may constitute a threat.* . . "(Emphasis added.) The prosecution's questions to JDH showed that it was relying on "statements or conduct that may constitute a threat" despite its pretrial representation to the Court and defense counsel.

The circuit court's finding that there was no reliance by the prosecution was an error.

The prosecution chose to introduce threat evidence, while it caused the circuit court to ignore the attendant instruction requirement. However, Comment 1 to Wis JI-Criminal 1900 states that "it is proper to instruct *on all alternatives that are supported by the evidence.*" (Emphasis added.) The instruction permitted the jury to reach a verdict that Greer was guilty of "otherwise disorderly conduct" without being informed that it could not do so if it was not

proven that Greer's words did not constitute a "true threat."

The real "true threat" issue was obfuscated because the prosecution chose to pursue contradictory positions: it urged the Court to omit a "true threat" instruction and then proceeded to rely on testimony by JDH to contend that Ms. Greer had in fact made "true threats" (as shown in "the whole video") to harm JDH.

The error which was the focus of Greer's postconviction motion was an error solely of the prosecution's making and it was a transgression of the stipulation approved by the Court. At the preliminary instructions conference, the Court elicited the prosecutor's position as to whether the disorderly conduct charge involved a "true threat," which would have required a specific instruction set out in Wis JI Criminal 1900: "[T]here is no threats there, any threat allegation, Mr. Flynn?" To which the prosecutor replied: "No." (Transcript of June 4, 2018 Jury Trial, at page 54).

However, fifteen transcript pages later (at page 69), the prosecutor, in his opening statement, specifically relied on the recording with the alleged verbal threat to do physical harm (i.e., "I got something for you"), that Kaprisha Greer directed

to JDH:

> ***You'll see her then say, "I got something for you."*** She gets back into her car, and that is when the recording ends. But [JDH] will . . . tell you that what happened next was the defendant struck him in the right knee with her car, and that she tried to do this again . . . ."

Then at page 91, the prosecutor goes full circle and asks JDH: "Did she threaten you?" He quickly accepted the State's leading question: "I mean, yeah, *the whole video is basically her threatening me* and trying to hit me." (Emphasis added.)

Despite this deliberate, unannounced abandonment of his earlier position in the instructions conference, the prosecutor then asked for and received permission to rely on and play the audio and video recording, which he and JDH, had portrayed as a verbal threat to harm JDH.

The apparent strategy of the prosecutor was to rely on evidence of an alleged verbal threat without having to bother with the Wisconsin jury instruction on a "true threat," or to meet the *Perkins'* requirement that a proper jury instruction be given to protect the defendant's First Amendment, free speech rights.

It was error for the circuit court to find that the prosecution's theory of the offense did not rely on the alleged

fact that a "true threat" was made. This finding necessarily implied that the prosecutor just somehow stumbled into mentioning the threat. But he raised the point not only in his opening statement, and then in his direct examination of the alleged victim, and finally in his closing argument. Twice, in his closing remarks he highlighted the fact that Greer's statement preceded her driving her car forwards, toward JDH: "I've got something for you." (June 5, 2018 trial transcript at pages 53, 69).

C. The instruction error was not harmless given the prosecution's use of the defendant's statement.

The circuit court erred when it found that any error was harmless. The prosecution was the beneficiary of its own error, and for that reason it has a higher burden of proving harmless error. Because the prosecution caused the error here, the correct "reasonable possibility" standard is the one set out in *State v. Poh*, 116 Wis.2d 510, 529–31, 343 N.W.2d 108, 118–19 (1984).

> Under the *Chapman* test the beneficiary of the constitutional error, in this case the state, must "... prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained ... *and the court must be able to declare a belief that [the constitutional error] was harmless beyond a reasonable*

> *doubt." Id.* 386 U.S. at 24, 87 S.Ct. at 828. The court determines whether the error is harmless . . . by assessing whether there is a reasonable possibility that the evidence complained of *might have* contributed to the conviction.

(Emphasis added.)

A good indicator that this was not harmless error flows from the circuit court's own reaction to a defense error that occurred later in the case. At that time the court ruled that defense counsel and the defendant violated a previously-agreed-upon prohibition on the State's introduction of Greer's prior juvenile offense adjudications for impeachment purposes. (June 5, 2018 trial transcript at page 38). Defense counsel's question and Greer's answer, that might have implied she had never faced a crime-related charge, apparently stepped over the line. The circuit court allowed the error to be corrected because "the state *would have been prejudiced improperly* by allowing that [prohibition on impeachment] ruling to stand given the question and answer in the direct examination of Ms. Greer." The circuit court effectively ruled that defense counsel's error, that transgressed a previously agreed-upon exclusion of evidence, *had not been harmless* to the State and needed correction. The same logic should have been applied here.

The prosecutor's transgression, by improperly injecting

"true threat" evidence into the case, indelibly prejudiced Greer. It cannot be said with confidence that the "true threat" evidence and lack of instruction "did not contribute to the verdict obtained."

CONCLUSION

For the reasons stated above, Kaprisha Greer respectfully requests that this Court reverse the judgment of conviction and remand for a new trial.

Dated September 4, 2019 at Milwaukee, Wisconsin.

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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 4,209 words.

Dated September 4, 2019.

Respectfully submitted,

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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 September 4, 2019.

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