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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Appeal Case No. 2019AP000806

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

KAPRISHA E. GREER,

Defendant-Appellant.

Appeal of a Written Decision and Final Order Entered April 15, 2019 in Milwaukee County Circuit Court Case No. 2017CM001386, Denying Motion for Post-Conviction Relief, Circuit Court Michael J. Hanrahan, Presiding

BRIEF OF PLAINTIFF-RESPONDENT

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BRIEF OF PLAINTIFF-RESPONDENT

ISSUE PRESENTED

Did the circuit court properly deny Greer's post-conviction motion, which alleged the circuit court erred by not including the "true threat" language of Wisconsin Criminal Jury Instruction 1900 during closing instructions to the jury which resulted in plain error?

Trial court answered: Any error regarding the inclusion of the "true threat" instruction was waived, and that if there was an error, the error was harmless because Greer failed to

explain how the "true threat" paragraph would have led the jury to acquit on the disorderly conduct charge.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication. The briefs in this matter can fully present and meet the issues on appeal and fully develop the theories and legal authorities on the issues. *See* Wis. Stat. (Rule) 809.22(1)(b). Further, as a matter to be decided by one judge, this decision will not be eligible for publication. *See* Wis. Stat. (Rule) 809.23(1)(b)4.

STATEMENT OF THE CASE

On May 3, 2017, Greer was charged with Endangering Safety by Use of a Dangerous Weapon and Disorderly Conduct in case number 17CM1386. (R1:1) Both charges included the domestic abuse assessments. (R1:1) While the above case was pending, Greer failed to appear in court and a subsequent case was issued in Milwaukee County Case 18CM513 which charged Greer with Misdemeanor Bail-Jumping. (R83) Both cases proceeded to jury trial on June 4, 2018. (R83)

In the Criminal Complaint for case 17CM1386, the State charged that Greer engaged in violent, abusive, indecent, profane, boisterous, unreasonably loud, or otherwise disorderly conduct for the incident that occurred on April 28, 2017. (R1:1) During the preliminary jury instruction conference at trial, the State did not ask for the true threat paragraph of the disorderly conduct instruction and defense counsel did not make any argument or request as to the inclusion of the threat paragraph. (R84:54) In opening statements, neither the State nor the defense stated that Greer threatened the victim JDH. (R84:69-72)

During direct examination of JDH, the State asked if Greer threatened him, to which JDH replied, "I mean, yeah, the whole video is basically her threatening me and trying to hit me." (R84:91). There is no further discussion of the threat described by JDH until cross-examination. On cross examination, defense counsel asked JDH if Greer made verbal threats to him, and JDH stated, "I mean, when she was going to

her vehicle, you can clearly hear her saying "I got something for you." I took that as a threat." (R84:98) Defense counsel then immediately moved on to asking JDH about how he broke Greer's windshield. (R84:98) Greer elected to testify in this jury trial, and while on cross-examination Greer admitted to being loud and boisterous during this incident. (R85:27) When asked whether this argument occurred in a residential area, Greer replied, "I mean, you can consider it that. It's in the middle of the hood, but it's residential." (R85:27). Greer further admitted that there are homes in the area and people live there. (R85:27) Greer also stated on cross examination that she slapped the phone out of JDH's hand, but denied it was a violent act. (R85: 27-28).

The case was submitted to the jury on June 5, 2018, and the jury returned a verdict of guilty on count 2 disorderly conduct. (R86:2) The jury returned not guilty verdicts on Count 1 in case 17CM1386 and on Count 1 in case 18CM513. (R86:2-3)

On December 14, 2018, Greer filed a motion for post-conviction relief. Greer alleged that the true threat paragraph of the Wisconsin Disorderly Conduct Jury Instruction (1900) was required to avoid a guilty verdict that punished Greer's speech protected by the First Amendment. (R45:4) Greer alleged that the instruction permitted the jury to reach a guilty verdict without being informed that it could not do so if it was not proven that Greer's words did not constitute a "true threat." (R45:6)

Judge Hanrahan, denied the motion by written order dated April 15, 2019. He ruled,

> In this instance, there was ample evidence for the jury to find the defendant guilty of disorderly conduct, even without the threat evidence, based on the conduct she admitted to (yelling at the victim in a residential neighborhood at a late hour in the evening and slapping the phone out of his hand) and her admission that she was loud and boisterous. Under the circumstances, the court finds there is no reasonable probability that the jury would have acquitted the defendant of this count without the threat evidence.

(R66:5-6)

> Furthermore, even if the instruction were given, the defendant makes no meaningful argument as to how the "true threat" paragraph would have led the jury to acquit on the charge of disorderly conduct. The "true threat" 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."

(R66:6) (Footnote omitted)

This appeal follows.

STANDARD OF REVIEW

A circuit court has broad discretion in deciding whether to give a particular jury instruction, and the court properly exercises its discretion when it fully and fairly informs the jury of the law that applies to the charges. *State v. Ferguson,* 2009 WI 50, 317 Wis. 2d 586, 767 N.W.2d 187, citing *State v. Fonte,* 2005 WI 77, ¶9, 281 Wis. 2d 654, 698 N.W.2d 594. Whether a jury instruction fully and fairly informs the jury of the law applicable to the charges being tried is a question of law to be reviewed independently. "We review whether it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the [instructional] error "as a question of law." *State v. Harvey, 2002 WI 93,* 254 Wis. 2d 442, 647 N.W.2d 189. See also *State v. Gonzalez,* 2011 WI 63, ¶20-21, 335 Wis. 2d 270, 802 N.W.2d 454 ("When a jury instruction is challenged as not completely and correctly informing the jury of the law applicable to the charge, the challenger has presented a question of law that an appellate court determines independently of the circuit court…but benefiting from their analyses.")

ARGUMENT

I. Defense counsel failed to object during the jury instructions conferences and failed to request that the true threat paragraph be added, therefore the objection is waived.

Instruction and verdict conferences are governed by Wis. Stat. §805.13(3) (2017-2018). The statute instructs that the court shall hold a conference with the attorneys outside the presence of the jury. *Id.* The court shall then inform the attorneys of the instructions it will read to the jury. "Failure to object at the conference constitutes a waiver of any error in the proposed instructions or verdict." *Id.* "'[U]nobjected-to errors are generally considered waived; and the rule applies to both evidentiary and constitutional errors.'" *State v. Davis*, 199 Wis. 2d 513, 517, 545 N.W.2d 244 (Ct. App. 1996) (citation omitted).

The statutorily required instruction conference occurred in the case at hand, both for the preliminary jury instructions as well as the closing instructions to the jury. (R84:53-55) Prior to the conference regarding closing instructions, the court had provided a copy of the proposed instructions to the state and defense. (R85:35) Once the jury was excused at the close of evidence, the court asked the parties if they had an opportunity to review the draft instructions. (R85:35-37) Both parties indicated they had, and the only discussion was about Wisconsin Criminal Jury Instruction 327 regarding impeachment of the defendant as a witness. (R85:36) Neither party mentioned any concern about the disorderly conduct jury instruction or made any request to have the true threat paragraph of the instruction included. (R85:35-37) Based on the facts in the record as cited above, under Wis. Stat. 805.13(3), Greer waived any error that may have resulted from not including the true threat instruction.

II. The State did not rely on a true threat as an alternative theory of prosecution as to the disorderly conduct count.

The chief case Greer cites in her post-conviction brief is *State v. Perkins,* in which the Court held that,

> "[T]his court may reverse a 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."

State v. Perkins, 2001 WI 46, 243 Wis. 2d 141, 626 N.W.2d 762.

In the *Perkins* case, the defendant was charged with one count of threatening a judge. The defendant did not object to the jury instruction as it was written and he was convicted of threat to a judge. The defendant then appealed. The Supreme Court discussed the elements of the jury instruction for the charge of threat to a judge and focused specifically on the element that required the jury to find the defendant threatened to cause bodily harm to the judge. The jury was not instructed as to what language would be sufficient to find the defendant did indeed threaten to cause bodily harm. *Id. at 162.* The Court found that because the jury was not provided with a definition of what constitutes a threat, they were not aware of what test needed to be applied in considering whether the defendant threatened bodily harm.

However, the *Perkins* case is factually distinguishable from the case at hand. Greer argues that by not giving the true threat instruction the real controversy was not fully tried. Greer then cites Justice Wilcox's concurring opinion in the *Perkins* case, arguing that where a jury instruction is missing an explanation regarding an element of an alleged offense, there can be no jury verdict on that element, therefore the harmless error analysis is inapplicable. (R45:7) That opinion does not apply to the case at hand because, unlike the *Perkins* case, the jury did not need to find that Greer threatened JDH. That is not one of the elements of the disorderly conduct statute. The jury only needed to find the Greer engaged in, "violent, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly conduct." (R85:43) Nothing in either element of the disorderly conduct instruction requires the jury to consider whether Greer threatened JDH and therefore the jury did not need to be instructed on how to define a threat.

Although the State did ask JDH on direct examination if Greer threatened him, this was not an alternative theory of prosecution as Greer argues in her post-conviction motion. (R45:6) The State did not argue this was a threat at any point during its closing arguments. (R85) The State did mention Greer's statement "I got something for you" in his rebuttal argument, but never categorized it as a threat, and never referenced JDH's testimony that he (JDH) took that statement as a threat. (R85:69) Furthermore, the State never argued that JDH's testimony about what he considered to be a threat fit into

any of the factors in the first element of disorderly conduct. (R:85) The State only argued that Greer admitted during cross examination that she was loud and boisterous, which are part of the first element of disorderly conduct. (R85:55)

III. Even if the court finds the true threat paragraph should have been given, the omission of that paragraph was harmless error.

Wis. Stat. §901.03(4) (2017-2018) recognizes the plain error doctrine. The plain error doctrine allows appellate courts to review errors that were otherwise waived by a party's failure to object. *State v. Jorgenson*, 2008 WI 60, 310 Wis. 2d 138, 754 N.W.2d 77, *citing State v. Mayo*, 2007 WI 78, 29, 301 Wis. 2d 642, 734 N.W.2d 115. The existence of plain error will turn on the facts of the particular case. *Id.* at ¶22. If the defendant shows that the error that was not objected to is fundamental, obvious, and substantial, the burden shifts to the State to show the error was harmless. *Id*. at ¶23. The Supreme Court in *Jorgenson* explained:

> The plain error doctrine allows appellate courts to review errors that were otherwise waived by a party's failure to object. Plain error is "error so fundamental that a new trial or other relief must be granted even though the action was not objected to at the time." The error, however, must be "obvious and substantial." Courts should use the plain error doctrine sparingly.

Id. at ¶21 (quoted sources and internal citations omitted).

An error is considered harmless unless the error affects the substantial rights of the adverse party. The harmless error principle is outlined in Wis. Stat. § 805.18 (2017-2018). Although this section is in the code of civil procedure, it is applicable in criminal cases. *State v. Dyess*, 124 Wis. 2d 525, 370 N.W.2d 222 (1985). The harmless error concept has a presumption against an error being prejudicial. *See City of La Crosse v. Jiracek Cos.*, 108 Wis. 2d 684, 324 N.W.2d 440 (Ct. App. 1982).

The Wisconsin Supreme Court in *Dyess* discussed the harmless-error test. 124 Wis. 2d 525, 543-547. For an error to

affect the substantial rights of a party, there must be a reasonable possibility that the error contributed to the outcome of the action or proceeding at issue. "A reasonable possibility of a different outcome is a possibility sufficient to undermine confidence in the outcome." *Id.* at 544-545; *See also State v. Harvey*, 254 Wis. 2d 442 at 467 (Error is harmless if it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error). "If the error at issue is not sufficient to undermine the reviewing court's confidence in the outcome of the proceeding, the error is harmless." *Evelyn C.R. v. Tykila S.*, 2001 WI 110, ¶28, 246 Wis.2d 1, 629 N.W.2d 768.

In this case, Judge Hanrahan was correct in his written decision that there is ample evidence for the jury to convict Greer of disorderly conduct absent the true threat paragraph. Given the testimony at trial and Greer's own admissions, there is no reasonable possibility of a different outcome even if the true threat paragraph was given. Greer has failed to show in her brief that the un-objected to error of the omission of the true threat instruction is plain error. Greer argues in her motion that it cannot be said with confidence that the "true threat" evidence and lack of instruction "did not contribute to the verdict obtained." (Brief of Defendant-Appellant, p. 17) Greer makes this conclusory assertion without any analysis or support to establish how the omission of the true threat paragraph is fundamental, obvious or substantial.

Assuming, arguendo, that, Greer met her burden of establishing plain error, the burden then shifts to the State to prove the omission is a harmless error. Greer admitted on the stand during cross-examination that she was boisterous and loud during this incident. When asked if her loud and boisterous conduct occurred in a residential area, Greer replied, "I mean, you can consider it that. It's in the middle of the hood, but it's residential." (R85:27). Greer further admitted that there are homes in the area and people live there. (R85:27) Greer also stated on cross examination that she slapped the phone out of JDH's hand, but denied it was a violent act. (R85: 27-28). In this case, it is entirely reasonable for the jury to have found Greer guilty of disorderly conduct because Greer admitted to several modes of conduct that fall within the first element of disorderly conduct, and her conduct under the circumstances as

they then existed would have tended to cause or provoke a disturbance. (R85:53, 55)

CONCLUSION

For the reasons herein, the State asks that the court affirm the denial of Greer's motion for post-conviction relief.

Dated this 31 day of October, 2019.

Respectfully submitted,

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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 word count of this brief is 2,617.

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Date Chelsea Pierski
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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 s. 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.

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