STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2022AP000730-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RYAN D. WILKIE,

Defendant-Appellant.

On Appeal from a Judgment of Conviction,
Entered in the Eau Claire County Circuit Court,
the Honorable Sarah Harless Presiding

REPLY BRIEF OF DEFENDANT-APPELLANT

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TABLE OF CONTENTS

CASES CITED

CONSTITUTIONAL PROVISION AND STATUTE CITED

ARGUMENT

I. The circuit court erred by denying Wilkie's motion to dismiss because the complaint did not establish probable cause.

The Fourth Amendment demands that the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." When the police obtain evidence "by physically intruding on persons, houses, papers, or effects, a search within the original meaning of the Fourth Amendment has undoubtedly occurred." *Florida v. Jardines*, 569 U.S. 1, 5 (2013) (internal citation omitted). Under both the Wisconsin and United States Constitutions, "a warrantless search is per se unreasonable" except when a "jealously and carefully drawn" exception to the warrant requirement applies. *State v. Boggess*, 115 Wis. 2d 443, 449, 340 N.W.2d 516 (1983).

The state concedes that police entered Wilkie's home without a warrant and concedes that it is the state's burden to prove an exception to justify the entry. (Resp. Br. 6). Because the police did not have lawful authority to enter his home under Wis. Stat. § 946.41, any warrantless entry would violate Wilkie's Fourth Amendment rights. *State v. Ferguson*, 2009 WI 50, ¶¶14-15, 317 Wis. 2d 586, 767 N.W.2d 187. Because the police had no lawful authority to enter his home, Wilkie correctly told the officers they needed a warrant to enter. (R.55:2). Thus, the criminal

complaint never established probable cause that Wilkie knew or believed he was obstructing an officer acting with lawful authority. *State v. Lossman*, 118 Wis. 2d 526, 536, 348 N.W.2d 159.

A. The complaint did not establish probable cause that police had lawful authority to enter Wilkie's home.

The circuit court found that police had authority to enter Wilkie's home under the community caretaker function. (R.36:7). But as the state concedes on appeal, the Fourth Amendment does not permit warrantless entry into a home based on the community caretaker function after *Caniglia v. Strom*, ___ U.S. ___, 1598, 141 S.Ct. 1596 (2021). (Resp. Br. 5). Instead, the state claims that an "emergency aid exception" to the warrant requirement applies. (Resp. Br. 7-8).

1. The state never argued the emergency aid exception in the circuit court.

When confronted with *Caniglia*'s binding rule through Wilkie's motion to reconsider, the state doubled down on the community caretaker exception. (R.38:2). Thus, the state never raised, and the circuit court never considered, the emergency aid exception when finding that "exigent circumstances" existed to justify the warrantless entry. (R.70:2-4). While nothing prevents the state from making the emergency aid argument for the first time on appeal, this court need not consider it. *In re Guardianship of*

Willa L., 2011 WI App 160, ¶¶23-24, 338 Wis. 2d 114, 808 N.W.2d 155.

Citing *State v. Ware*, 2021 WI App 83, 400 Wis. 2d 118, 968 N.W.2d 752, the state claims that "the emergency aid exception applies even if the entry was originally examined under the community caretaker doctrine." (Resp. Br. 6). But in *Ware*, the state had no opportunity to argue the emergency aid exception in the trial court before *Caniglia* was decided. *Id.*, ¶14. Here, the state could have preserved the emergency aid argument but forfeited it by again citing the community caretaker exception after *Caniglia* was decided. *Willa L.*, 338 Wis. 2d 114, ¶¶25-27.

Because Wilkie had no opportunity to refute the emergency aid exception argument in the circuit court, this court should not consider it on appeal. But even if this court considers this argument, the state cannot meet its burden to justify the officers' warrantless entry into Wilkie's home under the emergency aid exception.

2. The circuit court never applied the two-part test for the emergency aid exception.

The community caretaker and emergency aid exceptions are "not one and the same." *State v. Pinkard*, 2010 WI 81, ¶26 n.8, 327 Wis. 2d 346, 785 N.W.2d 592. Unlike the emergency aid exception, "[t]he community caretaker exception does not require the circumstances to rise to the level of an emergency

to qualify as an exception to the Fourth Amendment's warrant requirement." *Id*. On the other hand, the emergency aid exception "demands that the government official's actions be motivated solely by a perceived need to render immediate aid or assistance, not by a need or desire to obtain evidence for a possible prosecution." *Boggess*, 115 Wis. 2d at 450.

To determine whether the emergency aid exception applies, Wisconsin courts apply a two-part test to determine whether:

> Under the totality of the circumstances a reasonable person would have believed that: (1) there was an immediate need to provide aid or assistance to a person due to actual or threatened physical injury; and (2) that immediate entry into an area in which a person has a reasonable expectation of privacy was necessary in order to provide that aid or assistance.

Ware, 400 Wis. 2d 118, ¶22.

Despite Wilkie's *Franks-Mann*[1] motion and motion to reconsider under *Caniglia,* the circuit court never examined the totality of the circumstances and never applied any sort of objective test to determine whether the complaint was sufficient. Instead, the circuit court simply reviewed the complaint and summarily found that the police "attempted entry into the home to investigate" the 911 call. (R.70:3). If the court had reviewed the totality of the circumstance

[1] *Franks v. Delaware*, 438 U.S. 154 (1979); *State v. Mann*, 123 Wis. 2d 375, 367 N.W.2d 209 (1985).

and applied the required two-part objective test, the court would have necessarily granted Wilkie's motion to dismiss. Under the totality of the circumstances, there were no exigent circumstances justifying entry.

3. The emergency aid exception did not justify warrantless entry into Wilkie's home.

The state ignores the two-part emergency aid test in its response brief and never mentions the fact that the circumstances must rise to the level of an emergency. And while the test is an objective standard, the state asks this court to rely on the officer's trial testimony about his subjective belief. *State v. Larsen*, 2007 WI App 147, ¶18, 302 Wis. 2d 718, 736 N.W.2d 211. Yet the officers' statements and actions at the time they sought to enter show that they did not believe immediate entry was required.

Officers here sought to enter Wilkie's home based on a caller reporting a verbal argument from inside the home. (R.55:1-2). While the state claims that the caller "reported loud banging noises, which he believed to be from a physical altercation between the male and female subjects," the transcript of the 911 call shows that the caller never said the argument was physical and explained that he did not "know what they're doing." (Resp. Br. 7; R.56:1). When officers arrived and asked to come in, Wilkie immediately asked them to watch the back door to make sure his daughter couldn't leave, told them they

could talk to his daughter outside, and confirmed that nobody inside was hurt. (R.51:1).

Knowing that they could enter through the back door, rather than enter to render immediate aide, the officers chose to engage with Wilkie to "figure out what's going on." (R.55:1). They asked Wilkie's permission to enter and told him "we wanna talk to you" and "wanna talk to everybody else inside." (R.55:1). As the officers explained, the caller "heard 'stop it'" and "we don't know what's going on." (R.55:2).

After Wilkie correctly reminded the officers about the warrant requirement and correctly explained that "yelling and screaming doesn't mean there's somebody hurt in there," the officers focus shifted to arresting Wilkie for refusing to allow them to enter. (R.55:2-3). Whatever happened inside, the officers decided to "figure it out" later because they "can only deal with one thing at a time" and their priority was to "deal with" Wilkie. (R.55:3). Under the totality of the circumstances, nobody—not the officers, the state, or the circuit court—has ever pointed to an objective need to render immediate emergency aid.

In contrast, in *Ware*, the officers received a 911 call with information that the caller had "observed a large amount of blood coming from a truck parked in the garage." *Id.*, ¶24. Officers were informed that Ware and his girlfriend had been "experiencing relationship troubles" and the caller "had not seen" the girlfriend "since the previous night." *Id.* The officers were also told that Ware had access to a firearm and

had been drinking and when they arrived, Ware told the officers, "I am the one you are looking for." *Id.*

In other words, unlike in *Ware*—where there was clear evidence of an immediate need to render emergency aid to an injured person—the officers here had no reason to believe someone suffered an "actual or threatened physical injury" and "immediate entry" was required. *Id.,* ¶24. Yet they arrested Wilkie for refusing to consent to their warrantless entry.

Even assuming the officers' attempted entry was based on a potential concern about the "health and safety" of the occupants, they had no lawful authority to enter without some proof of a true emergency. *Pinkard*, 327 Wis. 2d 346, ¶54. When it comes to the Fourth Amendment, "the home is first among equals." *Jardines*, 569 U.S. at 6. And, as the state concedes, the community caretaker exception cannot justify a warrantless entry into Wilkie's home. *Ware*, 400 Wis. 2d 118, ¶14.

B. The complaint did not establish probable cause that Wilkie knew or believed he was obstructing an officer acting with lawful authority.

There is nothing in the complaint establishing probable cause that Wilkie knew or believed he was obstructing an officer and knew or believed the officers were acting with lawful authority. *Lossman*, 118 Wis. 2d at 536. The state's response makes no attempt to show otherwise. The state also makes no effort to refute Wilkie's claim that it omitted critical

information from the complaint that would have negated probable cause. Like the circuit court, the state's response addresses only information in the complaint and ignores the recorded statements of the 911 caller, the police, and Wilkie. (Resp. Br. 7-8). As the state concedes, the circuit court's decision was "[b]ased solely on the criminal complaint. (Resp. Br. 7).

This court should view the state's failure to respond to Wilkie's claims as a confession of error. *See Charolais Breeding Ranches*, *Ltd. v. FPC Sec. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) ("Respondents on appeal cannot complain if propositions of appellants are taken as confessed which they do not undertake to refute"). Whether based on the state's confession of error or de novo review of the sufficiency of the complaint in light of Wilkie's *Franks-Mann* claim, this court should reverse and order the circuit court to vacate the judgment of conviction and dismiss the obstructing charge.

II. There was insufficient evidence to overcome Wilkie's presumption of innocence.

Without probable cause to believe that police were acting with lawful authority and that Wilkie knew he was obstructing officers acting with lawful authority, the obstruction charge should have never reached a jury. But this court should reverse and order a judgment of acquittal because—even in the light most favorable to the prosecution—the evidence at trial could not prove each element of the obstruction

charge beyond a reasonable doubt. *State v. Wulff*, 207 Wis. 2d 143, 149, 557 N.W.2d 813 (1997).

As discussed above and in Wilkie's appellant's brief, Wilkie correctly identified and pointed out the officer's need to obtain a warrant to enter his home. (R.55:1). Wilkie's subjective belief about the officers' lawful authority to enter his home was clear—absent a warrant, they had none. At trial, there was little dispute about Wilkie's subjective belief because his interaction with the police was recorded, transcribed, and presented to the jury. (R.73:88-89). By asserting his Fourth Amendment rights, Wilkie's actions reflected his subjective belief that the officers had no lawful authority to enter his home without a warrant. (R.55:1-3).

But according to the state—because the jury knew that police were in uniform, arrived in a marked police vehicle, introduced themselves as police, and explained why they wanted to enter Wilkie's home without a warrant—the "jury could have found that law enforcement were acting in their lawful authority." (Resp. Br. 9-10). In other words, the state's sufficiency argument discards Wilkie's subjective intent and assumes the jury could find that he knew police were acting with lawful authority simply because they were police.

But contrary to the state's scant response, Wilkie's subjective intent does matter and "must be ascertained, based on the totality of the circumstances, including what the defendant said or did." *Lossman*,

118 Wis. 2d at 542-43. The only reasonable conclusion based on the totality of the circumstances was that Wilkie did not believe the officers were acting with lawful authority. As discussed above, Wilkie's subjective belief was correct.

To act with lawful authority, an officer's actions must be lawful and it is "black letter law that a constitutional violation is an unlawful act." *Ferguson*, 317 Wis. 2d 586, ¶¶14-15. Because the totality of the circumstances prove that Wilkie believed the officers' attempted entry into his home was unconstitutional, no reasonable jury could be convinced "beyond a reasonable doubt of the existence of every element of the offense" of obstruction. *Jackson v. Virginia*, 443 U.S. 307, 316 (1979). Thus, this court should reverse and order the circuit court to enter a judgment of acquittal. *State v. Ivy*, 119 Wis. 2d 591, 608, 350 N.W.2d 622 (1984).

CONCLUSION

For the reasons stated above and in his appellant's brief, Ryan D. Wilkie respectfully requests an order to vacate the judgment of conviction on the obstruction charge and enter a judgment of acquittal.

Dated this 8th day of May, 2023.

Respectfully submitted,

Electronically signed by
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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in S. 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 2,258 words.

Dated this 8th day of May, 2023.

Signed:
Electronically signed by
David J. Susens
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