STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2023AP000697-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

TROY ALLEN SHAW,

Defendant-Appellant.

On Appeal from a Judgment of Conviction and Order Denying Postconviction Relief, Entered in the Sheboygan County Circuit Court, the Honorable Angela W. Sutkiewicz, Presiding.
Trial Court Case No. 2020CM278

BRIEF OF PLAINTIFF-RESPONDENT

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STATEMENT OF ISSUES

1) Did the circuit court properly deny Shaw's motion for postconviction relief on the basis that the prosecutor's comments did not amount to plain error?

The circuit court answered: Yes

This Court should answer: Yes

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State believes that neither oral argument nor publication are necessary. The issues raised on appeal will be fully developed in the briefs submitted to the Court. Furthermore, the issues involve no more than the application of well-settled law to the facts of this case.

STATEMENT OF THE CASE

I. Factual background.

On March, 20, 2020, law enforcement officers with the Sheboygan Police Department were dispatched on a report of an individual causing a disturbance. (R.2:2). Before officers arrived on scene, Shaw called dispatch and screamed at them before hanging up. (R.2:2). Upon arrival, officers made contact with a minor occupant who let Shaw inside of her residence, which was across the street from the initial incident. (R.2:2). The minor saw Shaw screaming and running through her yard. (R.2:2). While the minor allowed him inside, Shaw "freaked her out" and she wanted him out. (R.2:2). Officers also made contact with the owner of the residence, who also said he did not want Shaw inside of his residence. (R.2:2).

Despite Officers many attempts to calm Shaw down and order him out of the residence, Shaw refused. (R.2:2). Shaw then began locking the doors to the

residence. (R.2:2). Officers specifically told Shaw that the owner wanted him to exit the residence, but he refused. (R.2:2). He remained argumentative with and yelled at officers. (R.2:2). Officers were ultimately able to grab ahold of Shaw and take him into custody. (R.2:2-3).

II. Charges and trial.

On April 29, 2020, the State of Wisconsin filed a complaint charging Shaw with Disorderly Conduct, Criminal Trespass, and Obstructing an Officer. (R.2:1-3). On September 29, 2021, a jury trial on all three charges commenced. (R.88:1).

III. Postconviction motion and appeal.

During the course of the trial, the State called four witnesses. The first witness was Officer Trisha Saeger. She testified to Shaw's conduct in great detail. During their initial contact with Shaw, "[h]e was very agitated, excited, flailing his arms, yelling, shouting, a lot of movements. He just seemed very flustered and excited. Not a happy excited, just like angry and amped." (R.88:131). Officer Saeger and Officer Christopher Sondalle tried to speak with Shaw when they initially arrived on scene, but he disobeyed their commands and left. (R.88:131).

Officer Saeger ultimately made contact with the minor occupant of the residence where Shaw was hiding. (R.88:151). Now that two minors were involved, Officer Saeger directed the minor to have Shaw exit the residence so as to not escalate the situation. (R.88:151). Officers tried to unsuccessfully gain Shaw's cooperation as they made arrangements for the appropriate law enforcement agency to take over. (R.88:156-58).

Officer Saeger assured Shaw many times that they were only there to speak with him and did not want to shoot him. (R.88:176). Their demeanor was not threatening but

Shaw "made the situation into what he believed -- what was happening, and in his mind he may have believed that, but it was nothing our actions did." (R.88:176).

The minor then called her father, who owned the residence, with whom Officer Saeger spoke. (R.88:159). During this call the owner told Officer Saeger that Shaw was not allowed to be inside of his house. (R.88:159-60). After this call, officers told Shaw the owner wanted him out. (R.88:160). As Shaw began locking the doors, officers saw that they had one access point left to get inside. (R.88:161-62). Officers took that opportunity and entered to retrieve Shaw. (R.88:162).

The minor then testified that she had never seen Shaw prior to this incident. (R.88:180). When she Shaw outside, the minor went out to better understand what was going on. (R.88:181). Shaw, who was very skittish and very stressed out, asked the minor to come inside, which she allowed. (R.88:181-82). When law enforcement arrived, the minor tried convincing Shaw to exit her house to speak with them. (R.88:183). Shaw refused. (R.88:183). During this exchange, the minor was stressed and freaked out that she might also be shot based on Shaw's insistence that he was going to be shot by law enforcement. (R.88:184; 189).

She testified that not only did she tell Shaw that he had to get out of the house, but her boyfriend did as well. (R.88:190; 193).

Next the owner testified that on the date in question, he received a phone call from his minor daughter while he was at work. (R.88:195). The minor seemed flustered and handed the phone to a law enforcement officer who advised that Shaw was inside of his house. (R.88:195-96). The owner advised that Shaw did not have permission to be inside of his residence and wanted him out. (R.88:196).

Officer Sondalle then testified that during his initial interaction with Shaw, who was highly agitated and acted

aggressively, he reassured him that he was not a threat. (R.88:206-08).

Officer Sondalle Ultimately went to the owner's residence to once again make contact with Shaw. (R.88:215). Upon arrival, Officer Sondalle spoke with the minor who said that Shaw was inside the residence. (R.88:215). Officer Sondalle next made contact with Shaw and asked him to exit the residence many times and also told him that the owner wanted him out. (R.88:219). Shaw began barricading himself inside of the house, but was but was ultimately retrieved by officers. (R.88:221).

At the conclusion of the testimony, the court instructed the jury. The jury was instructed as to the elements of criminal trespass, which was defined as. "[o]ne who intentionally remains in 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." (R.88:254-55). The elements were articulated as follows:

> "One, the defendant intentionally remained in the dwelling of another." (R.88:255). "Two, the defendant remained in the dwelling without the consent of someone lawfully upon the premises." (R.88:2550. "Three, the defendant remained in the dwelling under circumstances tending to create or provoke a breach of the peace." (R.88:255). "Four, the defendant knew that remaining in the dwelling was without consent and under circumstances tending to create or provoke a breach of the peace and knew that it was the dwelling of another."

(R.88:256).

The jury was also instructed as to how intent and knowledge can be found, in that "defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge." (R.88:256).

The circuit court made clear that evidence can be "the sworn testimony of witnesses," among other things. (R.88:259-60). Additionally, not every fact need be proved directly, but circumstantial evidence can be used to prove a fact indirectly. (R.88:260).

As for the remarks of counsel, the circuit court made clear that the "[r]emarks of the attorneys are not evidence," and to disregard if the remarks suggest certain facts not in evidence. (R.88:260). Furthermore, the jury was instructed that they are the sole judges of the credibility of the witnesses and of the weight to be given to their testimony. (R.88:261).

Before the parties began closing arguments, the court instructed the jury to:

> "[c]onsider carefully the closing arguments of the attorneys, but their arguments, and conclusions, and opinions are not evidence. Draw your own conclusions from the evidence and decide upon your verdict according to the evidence under the instructions given to you by the Court."

(R.88:262).

The State began closing arguments by explaining to the jury that if they can find any reasonable hypothesis consistent with Shaw's innocent, then they must find him not guilty. (R.88:264). Furthermore, the State noted that the jury has "to synthesize…you have to put all the evidence together, what makes sense." (R.88:264).

The State then set forth the evidence to support a finding of guilt on each element of criminal trespass. In relevant part, the State argued:

> "Two, is it true beyond a reasonable doubt that the defendant remained in the dwelling without the consent of someone lawfully on the premises? Okay. Well, we heard testimony from the 17-year-old daughter…who indicated to us in her testimony that she's pretty sure that she told [Shaw] to get out of the house. She said she knows 100 perfect that her boyfriend…told him to get out of the

> house multiple times. We also note he wasn't supposed to be in the house because the police officers told him, look, the father of this house told us to get you out of the house, and he came and testified to that effect.
>
> He testified that -- and we can see that on the video, that [Shaw] -- as Officer Sondalle is talking to [Shaw] through that window…they then say, hey, look, we've talked to the dad, he said you've got to get out."

(R.88:269-70).

The State went on to argue that:

> "[T]wo teenagers in a house with a strange man acting skittish and very stressed out, he's an uninvited guest, and you have the daughter…testifying that when she exits the house, he locks the house after she left the house, so now she's locked out of her own house. And I asked, well, what -- what did you think -- what was going through your head at the time? And she said, oh, no, what's going to happen? Now, she realizes there's a big mess here. And she said that she was fearful, and she wasn't really thinking about what might happen or could happen, her fear was in the moment."

(R.88:271-72). Furthermore, Shaw knew he didn't have consent "because [the minor] testifies that she's pretty sure she told him you can't be here, we're certain that [the minor's then boyfriend] told him he can't be there, and the cops told him that he can't be here." (R.88:272).

Shaw's attorney then presented his closing argument, which was followed by the State's rebuttal. (R.88:278-285). After the case went sent to the jury and they deliberated, the jury returned a guilty verdict on all three counts. (R.88:295-96).

Shaw filed a Motion for Postconviction relief on September 9, 2022. (R.96:1-18). The State filed a written response on February 6, 2023. (R.107:1-4). Shaw then filed a reply on February 10, 2023. (R.109:1-3). A motion hearing was held on March 21, 2023. (R.122:1-11). In

denying Shaw's motion on the closing argument issue, the circuit court held that "it was just something that was mentioned in closing argument." (R.122:8). The court also made note that a jury is always instructed that a closing argument is not evidence. (R.122:8). Most importantly, the court held that "in this case the jury was able to make their own determination from the testimony of [the minor] and decide whether or not consent was given." (R.122:8).

Shaw appeals the decision of the circuit court. (R.123:1).

ARGUMENT

I. The circuit court did not violate Shaw's fundamental rights by failing to find plain error.

A. The defendant bears the heavy burden to prove an error occurred that was so fundamental, obvious, and substantial as to require a new trial.

The plain error doctrine is implicated under circumstances where a party's failure to object affects a substantial right. *See* Wis. Stat. 901.03(4); *State v. Jorgensen*, 2008 WI 60, ¶ 21, 310 Wis. 2d 138, 754 N.W.2d 77. 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." *Jorgensen*, 310 Wis. 2d 138, ¶ 21 (citations omitted). "The error…must be 'obvious and substantial.'" *Id*. This doctrine should be used sparingly, where a basic constitutional right has not been extended to the accused. *Id*.

No bright line rule exists to determine whether reversal is warranted, as such the existence of plain error will turn on the facts of a particular case. *Id*. ¶ 22. For example, the quantum of evidence properly admitted and the seriousness of the error involved. *Id*. The defendant has the burden of proving that the unobjected to error is

fundamental, obvious, and substantial. *Id*. ¶ 23. "Inappropriate prosecutorial comments, standing alone, would not justify a reviewing court to reverse a criminal conviction obtained in an otherwise fair proceeding." *U.S. v. Young*, 470 U.S. 1, 11, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985).

Whether a due process violation has occurred is a question of law to be reviewed *de novo*. *State v. Luedtke*, 2015 WI 42, ¶37, 362 Wis. 2d 1, 863 N.W.2d 592.

B. The State's remarks during closing argument did not constitute plain error.

The State's remarks during closing arguments were not improper and therefore, no error occurred. Without any error, Shaw cannot meet his burden to prove that plain error required a new trial. Even if this Court were to conclude that the State's comments were improper, that error was not fundamental, obvious, or substantial. The circuit court reached the proper conclusion when it denied Shaw's claim. This Court should affirm.

During closing argument, the State mentioned that the owner told law enforcement he did not give consent for Shaw to be inside of the residence two times. (R.88:270). Not only did the State simply note facts in evidence, but also started his argument by pointing to the minor revoking consent. The State's closing argument was a mere outline of the evidence admitted during trial. First, the minor testified that she believed she told Shaw to get out of the residence. (R.88:269). Second, the minor's then boyfriend told Shaw to get out of the residence. (R.88:269-70). Third, law enforcement told Shaw that the owner wanted him out of the residence. (R.88:270). The State repeated these same facts one more time. (R.88:272).

The State did not exclusively rely on the owner's withdrawal of consent, but rather outlined all of the evidence that was admitted without objection. After remarking on each time Shaw was told that he did not have

permission to remain inside of the house, the State described the minor's emotional state during this incident. (R.88:271-72). At issue was a young girl who was fearful of what was happening. (R.88:271). Based on the minor's described fear of what might happen in that moment with Shaw who was "skittish and very stressed out," it is reasonable that her memory might not be clear. That aside, the State's argument on this issue was based on the evidence admitted at trial and outlined the minor, her mental and emotional state, and her revoking consent.

It is perfectly appropriate for a prosecutor to comment on admitted evidence during closing argument. "Prosecutors comment on evidence before the jury." *State v. Burns*, 2011 WI 22, ¶ 51, 332 Wis. 2d 730, 798 N.W.2d 166. "Counsel is allowed considerable latitude in closing arguments, with discretion given to the trial court in determining the propriety of the argument." *Burns*, 332 Wis. 2d 730, ¶ 48 (citations omitted). "A 'prosecutor may comment on the evidence, detail the evidence, argue from it to a conclusion and state that the evidence convinces him and should convince the jurors.'" *Id*. (citations omitted). As the State only discussed the evidence admitted at trial, his remarks were not improper and therefore did not constitute plain error. He simply outlined the many points at which Shaw was advised that the consent to remain inside of the residence was withdrawn.

To the extent this Court does find the remark was improper, Shaw has failed to satisfy the high burden that the remark was fundamental, obvious or substantial.

In *State v. Davidson*, 2000 WI 91, ¶ 81-89, 236 Wis. 2d 537, 613 N.W.2d 606, during closing arguments, the prosecutor commented on of a witness and asked the jury, "do you believe Tina as I do," inappropriately vouching for a witness *Id*. ¶ 82. During rebuttal, the prosecutor then commented on unsworn testimony. *Id*. ¶ 83. With this second remark, the prosecutor argued facts not in evidence. The Supreme Court of Wisconsin held that these

remarks were *limited in scope* and not "so egregious as to constitute plain error." *Id*. ¶ 88.

In *State v. Mayo*, 2007 WI 78, ¶ 34-52, 301 Wis. 2d 642, 734 N.W.2d 115, the prosecutor argued that the role of defense counsel was to "get his client off the hook" and "not to see justice done but to see that his client was acquitted." *Id*. ¶ 42. In reviewing all of these remarks, the *Mayo* court held that, while improper, these remarks were not improper within the context of the *whole trial* and did not amount to a due process violation. *Id*. ¶ 43.

While the circuit court noted that the State misspoke, closing arguments "are seldom carefully constructed in toto before the event; improvisation frequently results in syntax left imperfect and meaning less than crystal clear." *Donnelly v. DeChristoforo*, 416 U.S. 637, 646-47, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974). "A court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury…will draw that meaning from the plethora of less damaging interpretations." *Id*. at 647.

In the above-cited cases, the prosecutors vouched for a witness, commented on unsworn testimony, and disparaged defense counsel. When looking at these remarks within the context of the entire trial, it was determined that they were not so egregious as to constitute plain error. If the State's remarks are to be considered improper, they are certainly no more egregious than those from *Davidson* and *Mayo*. Therefore, these remarks fail to satisfy the high burden as being fundamental, obvious or substantial so as to warrant a new trial.

C. Even if the State's remarks during closing argument constituted plain error, it was harmless.

Even if Shaw's claims were sufficient to meet his burden and prove a plain error requiring a new trial, this

Court should find that the error was harmless. The error is harmless because the State can prove beyond a reasonable doubt that a rational jury would have found Shaw guilty absent the error.

If the defendant shows that the unobjected to error is fundamental, obvious, and substantial, the burden shifts to the State to show that the error was harmless. *State v. Jorgensen*, 2008 WI 60, ¶ 23, 310 Wis. 2d 138, 754 N.W.2d 77. This "inquiry is as follows; 'Is it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?'" *Mayo*, 301 Wis. 2d 642, ¶ 47 (citation omitted). Several factors can be used to determine whether an error is harmless, to include the frequency of the error, the nature of the State's case, or the overall strength of the State's case." *Jorgensen*, 310 Wis. 2d 138, ¶ 23 (citations omitted).

Here the error was articulated within the context of describing unobjected to evidence admitted at trial. The facts described a chaotic scene that was made to be so because of Shaw's conduct. Absent any remarks about the owner revoking Shaw's consent to be inside of his residence, a rational jury would have been able to find Shaw guilty of criminal trespass. This is because the minor testified that she believed she revoked consent, which put Shaw on notice that he was no longer permitted to be inside of the residence. (R.88:190). This evidence is strengthened by the testimony that her then boyfriend also directed Shaw to leave. (R.88:193). As the jury was instructed, witness testimony is evidence. Witness testimony is sufficient to prove the commission of a crime so long as a jury finds the witness credible. At no point during the trial were any questions raised regarding the minor's credibility. While helpful, corroboration by way of other witness testimony or physical evidence is not required. Therefore, it is clear that a rational jury would have been able to find the minor credible and therefore find her testimony credible.

CONCLUSION

The State's remarks during closing arguments did not constitute plain error as they were not improper. Without any error, Shaw has not met his burden to prove that plain error required a new trial. Even if, however, this Court were to conclude that the State's comments were improper, that error was not fundamental, obvious, or substantial.

Should this Court disagree and find that Shaw's claims were sufficient to meet his burden, any purported error was harmless. The State can prove beyond a reasonable doubt that a rational jury would have found Shaw guilty absent the error.

The circuit court reached the proper conclusion when it denied Shaw's claim. This Court should affirm.

Respectfully submitted, this 6th day of October, 2023.

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief conforms to the rules contained in Wis. Stats., § 809.19(8)(b), (bm), and (c). The length of this brief is 3,426 words.

Dated this 6th day of October, 2023

Signed:

Electronically signed by Sarra Clarkson
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