STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2023AP000697-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TROY ALLEN SHAW,

Defendant-Appellant-Petitioner.

PETITION FOR REVIEW

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ISSUES PRESENTED

Is it plain error when a prosecutor misinforms the jury of the proper legal standard? Can the misinforming the jury of the proper legal standard be harmless?

Both the circuit court and the court of appeals agreed that the prosecutor's closing arguments in this case were improper, but they concluded the arguments did not rise to the level of plain error. The court of appeals further determined even if it did, it was harmless.

CRITERIA FOR REVIEW

This case centers on Wisconsin's trespass statute, Wis. Stat. § 943.14(2). Under this statute, an individual is guilty of criminal trespass if the person

> … intentionally enters or remains in the dwelling of another without the consent of some person lawfully upon the premises or, if no person is lawfully upon the premises, without the consent of the owner of the property...

The defendant in this case, Mr. Shaw, entered the N's residence with permission of one of the occupants, JN. It was undisputed that JN's father, who owned the property but who was not on the premises, never consented to Mr. Shaw being in his home. It was also undisputed that Mr. Shaw remained

on the property after being told the father did not consent to his being there.

Part of the State's theory of guilt was that Mr. Shaw was guilty because he stayed on the premises after being told "the owner" did not consent to his being there. But under Wisconsin's trespass statute, JN's consent was the only consent that mattered. Whether JN's father – the owner – gave or revoked consent was not relevant so long as his daughter was on the premises and he was not. Nevertheless, the prosecutor argued that the jury could find Mr. Shaw guilty if they found that Mr. Shaw remained on the property after he was told that JN's father did not consent to his being there. In doing so, the prosecutor not only obfuscated the real issue – whether JN ever revoked her consent – but also gave the jury a clear path to conviction that was contrary to law.

In determining that this the error did not reach the level of plain error, the decision below noted evidence of JN's non-consent and also evidence of the father's non-consent. *State v. Shaw,* No 2023AP697-CR, ¶¶22-23, *unpublished slip op*. (Wis. Ct. App. Jan. 24, 2024) (*citing State v. Davidson*, 2000 WI 91, ¶88, 236 Wis. 2d 537, 613 N.W.2d 606; *State v. Mayo*, 2007 WI 78, ¶43, 301 Wis. 2d 642, 734 N.W.2d 115). But the focus on the quantum of evidence is irrelevant if there is a reasonable possibility that the jury did not consider it at all because they did not apply the correct legal standard.

The bulk of published case law on plain error due to improper prosecutorial argument deals with improper comments related to evidence or the weight that should be given to the evidence. There is no published case law addressing a prosecutor misinforming the jury about the correct legal standard. This Court should take review to provide and clarify the standard for plain error analysis when the error concerns the misapplication of the correct legal standard. Wis. Stat. (Rule) 809.62(1r)(c) (review is appropriate when a decision from this Court will help develop, clarify or harmonize the law). Because a defendant convicted by a jury that has applied the wrong legal standard would be a clear due process violation, review is also appropriate under Wis. Stat. (Rule) 809.62(1r)(a) (review is appropriate when there is a real and significant question of federal or state constitutional law).

This Court should also take review to develop and clarify the harmless error doctrine. The decision below explicitly noted that the three evidence-related factors were "of limited utility to the analysis of harmless error in this case." *Shaw,* No. 2023AP697-CR, ¶26 n.5 (*citing State v. Jorgensen*, 2008 WI 60, ¶23, 310 Wis. 2d 138, 754 N.W.2d 77). Because much of the harmless error doctrine is inapplicable to the kind of error in this case, this Court should take review and develop a standard for analyzing errors involving misstatements of the law. Wis. Stat. (Rule) § 809.62(1r)(c).

STATEMENT OF FACTS

The events of March 30, 2020~

On March 30, 2020, the City of Sheboygan Police department responded to a call from a Mr. F. regarding a disturbance in an apartment complex. (88:130). When officers arrived on the scene, they encountered Mr. Shaw, who appeared agitated and upset. (88:131; 55:0:37-1:27[1]). At this point, officers did not suspect Mr. Shaw of a crime and decided the best thing to do was to let Mr. Shaw be on his way. (88:166, 208). At no time did police tell Mr. Shaw that he could not leave or that he was under arrest, and they made no attempt to follow him when he left the scene. (55:1:00-1:30).

While in the apartment complex talking to Mr. F. and other neighbors about the alleged disturbance, dispatch received another call for help – this time it was from Mr. Shaw. (88:149). Mr. Shaw had left the apartment complex, crossed the street and placed a 911-call from inside a neighboring house. (88:149-152). Although Mr. Shaw did not previously know the owners of the house, he had asked permission to go inside the home and JN, who was at home with her

[1] Record numbers 54 and 55 are audio-visual exhibits from the trial that were played for the jury. Citations to these record cites include the relevant timestamp following the record cite.

boyfriend, gave him permission to do so. (55:12:19-12:23).

In crossing the street Mr. Shaw had left the Sheboygan city limits. (88:156, 169). Nevertheless, the City of Sheboygan police officers were close by and went to the N's house in response to Mr. Shaw's call for assistance. (88:210). When they got there, JN came outside to talk with law enforcement but Mr. Shaw did not. (55:11:28-12:28). JN reported to the officers that Mr. Shaw did not want to come out and speak to them because he was afraid the police officers would shoot him. (55:12:36-57). The officers asked JN if they could go inside the house, but she did not give the officers permission to do so. (55:12:52-55; 17:08). The officers then asked JN to go back inside and tell Mr. Shaw that they would not hurt him and that they would like him to come out and speak to them. (55:12:55-57). When JN went back inside the house, officers noted that JN did not appear to be scared or upset. (55:13:32-34). After JN and her boyfriend came out again, the officers told them to remain outside. (55:15:40).

Because the incident at the N's house was occurring outside of the City of Sheboygan, and "there was no report of active weapons or lives being threatened," the City of Sheboygan police officers were instructed by their supervisors to "remain on perimeter" until Sheboygan County sheriff deputies arrived. (88:157). While waiting for the Sheboygan County Sheriffs to arrive, City of Sheboygan Police Officer Chris Sondalle began talking with Mr. Shaw through an open window. (88:155; 55:16:45).

Mr. Shaw told the officer that he wished to talk with sheriffs, not the City of Sheboygan police and would not grant Officer Sondalle's request to come outside the house. (55:15:27-16:45, 18:00). Mr. Shaw told police that he had permission to be in the house and they did not. (55:19:54-20:00, 23:38, 24:19, 27:20). He also stated that he was not armed and showed Officer Sondalle that he was not carrying any weapons. (55:18:45, 19:37-19:33).

Meanwhile, another City of Sheboygan police officer, Trisha Saeger, spoke with JN's father on the phone. (88:159-60). JN's father, who was not on the premises, stated – in no uncertain terms – that he wanted Mr. Shaw out of the house. (88:160). JN's father left work to come home and deal with the situation as soon as he was apprised of it. (88:197).

Before JN's father arrived, Officer Sondalle relayed to Mr. Shaw that "the owner" wanted Mr. Shaw out of the house. (55:23:18-20). Mr. Shaw responded, incredulously, "Where is she?," evidently assuming the officer was referring to JN. (55:23:20-22). Mr. Shaw told police that "she" never told him to get out. (55:24:26-27). The officer never clarified that by "owner" he was referring to JN's father, who was not on the premises.

After the police informed Mr. Shaw that "the owner" didn't consent to him being on the premises, Mr. Shaw stopped communicating with law enforcement and started closing the windows and doors of the house. (55:25:00-28:11). As Mr. Shaw was

attempting to close the back door, the City of Sheboygan police grabbed him, pulled him outside and tased him. (88:162-163; 55:28:25-33).

~The trial~

About a month later, Mr. Shaw was charged with disorderly conduct, criminal trespass and obstructing an officer as a result of this incident and went to trial on all charges.[2] At trial, both Officer

[2] Three weeks before criminal charges issued in this case, the City of Sheboygan Police filed a Statement of Emergency Detention by Law Enforcement Officer pursuant to Chapter 51. *In the Matter of the Condition of T.A.S.,* Sheboygan County Case No. 20ME33 (this court may take judicial notice of circuit court records, *see Kirk v. Credit Acceptance Corp.* 2013 WI App 32, ¶5 n.1, 346 Wis. 2d 635, 829 N.W.2d 522). The Statement of Emergency Detention cited the events of March 30, 2020 as part of the basis for their request to emergently detain Mr. Shaw. *Id.* Though Mr. Shaw demanded a jury trial in the ME case, he was never afforded the statutory and constitutional due process protections guaranteed to individuals subject to Chapter 51 proceedings as a result of this Court's orders suspending jury trials during the pandemic. *See* Supreme Court Order, dated April 16, 2020, in *In the Matter of the Condition of T.A.S.*, Sheboygan County Case No. 20ME33 (applying the general prohibition on jury trials during the pandemic to Mr. Shaw's ME case). Despite the huge liberty interest at stake, this Court relieved the government of its burden to prove the necessity of the commitment and was able to detain and deprive Mr. Shaw of his liberty and bodily integrity for over 4 months without a commitment order. *Cf. Vitek v. Jones*, 445 U.S. 480, 491–92 (1980) (civil commitments are "a massive curtailment of liberty" requiring significant due process protections). Though Mr. Shaw doesn't have a separate legal basis to challenge the disorderly

Sondalle and Officer Saeger testified about the events that day and their body camera video was played for the jury. (88:125-178; 200-230). Mr. F testified about the initial disturbance and why he called the police and JN testified about her role in the events at her house. (88:102-125). JN's father testified that he never consented to Mr. Shaw being in his house that day. (88:197).

With respect to the trespass charge, JN testified that she told Mr. Shaw to leave her house – but when pressed, she admitted that she was not 100 % sure she had and actually could not remember. (88:192-193). During closing arguments, the prosecutor argued that regardless, once it was relayed to Mr. Shaw that the father did not give permission for Mr. Shaw to be in the house, Mr. Shaw was guilty of trespass. (88:270). The prosecutor emphasized the body camera footage that showed Mr. Shaw remaining inside the house for over six minutes after he was told the "owner" didn't consent to his being there: "so he's got 6-and-a-half minutes to know that he does not have consent to be

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conduct conviction, he maintains that the prosecution for all these misdemeanor charges is fundamentally unjust as the ME case demonstrates that government clearly believed the events on March 30, 2020 were caused by severe mental illness. By the time of trial in this case, the government had already extracted its pound of flesh – and achieved any sentencing goals of protection of the public and rehabilitation of the defendant – through the significant period of detention and involuntary medication. *See id.* ("the loss of liberty produced by an involuntary commitment is more than a loss of freedom from confinement").

in the house, so that is true beyond a reasonable doubt." (88:270).

Postconviction, Mr. Shaw argued the trespass conviction should be reversed because the prosecutor's argument was improper, contrary to law, and plain error.[3] The motion was denied and this appeal follows.

ARGUMENT

I. The trespass statute.

Under the plain words of the Wis. Stat. § 943.14(2), there are two alternative situations that can create criminal trespass: (1) when a person enters or remains in the dwelling of another without the consent of some person lawfully upon the premises; OR (2) *if no person is lawfully on the premises*, without the consent of the owner of the property. In this case, the second alternative clause never kicks in because JN was lawfully on the premises the entire time Mr. Shaw was in the dwelling. As such, the only issue for the jury should have been whether JN revoked her consent to allow Mr. Shaw on the premise and whether Mr. Shaw knew that she had revoked her consent, if she had.

[3] Mr. Shaw also claimed that there was insufficient evidence to support the obstructing conviction. The circuit court agreed and vacated the obstructing conviction. (117).

See WIS JI-CRIMINAL 1437.[4] Under the circumstances of this case, whether or not JN's father consented was legally irrelevant to whether Mr. Shaw committed criminal trespass.

The statute makes sense exactly because of the situation at hand. If multiple people in different locations have equal authority give or revoke consent, a question as to who has ultimate authority to give permission arises. The statute resolves this question by giving the authority to grant or deny permission to the person who is lawfully on the premises. This way, even if an off-the-premises owner of the house doesn't consent to a certain guest being on the premises, the guest will not be guilty of trespass so long as they have permission from a person lawfully on the premises.

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[4] The elements of criminal trespass to a dwelling are:

1. The defendant intentionally entered or remained in the dwelling of another.
2. The defendant entered or remained in the dwelling without the consent of someone lawfully on the premises.
3. The defendant entered or remained in the dwelling under circumstances tending to provoke a disturbance.
4. The defendant knew that the entry into or 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.

WIS JI-CRIMINAL 1437

It's not hard to imagine other situations in which an off-the-premises owner may not consent to an invited guest being in their house. Take, for example, a teenager who invites friends over when the parents are out of town or a spouse involved in an extramarital affair who brings home a lover. In these cases, the invited guest is not guilty of criminal trespass despite the fact that a lawful owner legitimately objects to their presence on the premises. The statutory provision granting the authority to consent to the person who is on the premises is critical in cases like these where there are multiple people capable of consenting, and importantly, when the multiple people capable of consenting disagree about whether consent should be given.

If this were a case of off-the-premises consent, the pattern jury instructions contemplate a different instruction. *See* WIS JI-CRIMINAL 1437, Comment 2 (noting 2015 Wis. Act 176 added the language "or, if no person is lawfully upon the premises, without the consent of the owner of the property that includes the dwelling"). But this was not the situation of this case and this instruction was not requested or given. In this case, JN was on the premises the entire time Mr. Shaw was in the house. Therefore, the only question relevant to whether Mr. Shaw committed the crime of trespass was whether JN had ever revoked her consent and, if she did, whether Mr. Shaw knew it. *See* WIS JI-CRIMINAL 1437 (elements (2) and (4)). The fact that JN's father never consented was irrelevant to whether Mr. Shaw was guilty of trespass.

II. This Court should take review to clarify the plain and harmless error doctrines in cases where the prosecutor misinforms the jury of the correct legal standard.

Because the law doesn't grant JN's father, who was not on the premises, the authority to consent as long JN was lawfully on the premises, it was improper for the prosecutor to argue to the jury that they could find Mr. Shaw guilty because JN's father did not give Mr. Shaw permission to be there. *Shaw,* No. 2023AP697-CR, ¶¶18-19.

The analysis below concluded that the error did not reach the level of plain error because of "the quantum of evidence presented" on JN's non-consent. *Id.,* ¶22. It further concluded that because the prosecutor's improper argument – that the jury could convict if they found the owner did not consent – was followed by an argument citing the correct legal standard – that the jury could convict if they found JN did not consent, the error was not serious. *Id.,* ¶23. But this misses the mark.

This Court should take review and clarify that quantum of evidence inquiry is not the relevant inquiry when there is a misstatement of law. When there is a real possibility that the jury heeded the prosecutor's misinstruction and assessed the evidence under the wrong legal standard – as there is here – the defendant's constitutional due process right to a jury determination of guilt has been violated. This type of

error is fundamental and substantial and should not be allowed to stand.

A. Improper arguments and plain and harmless error.

Plain error occurs when errors are "so fundamental that a new trial … must be granted even though the action was not objected to at the time." *State v. Jorgensen*, 2008 WI 60, ¶21, 310 Wis. 2d 138, 754 N.W.2d 77; *see also* Wis. Stat. § 901.03. There is no bright-line rule that dictates whether an error is plain, necessitating reversal. *State v. Mayo*, 2007 WI 78, ¶29, 301 Wis. 2d 642, 734 N.W.2d 115. "Rather, the existence of plain error will turn on the facts of the particular case." *Id.* When a defendant alleges that a prosecutor's statements and arguments are improper, the test applied is whether the statements "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Id.,* ¶43 (quotation omitted). Finally, the State has the burden to prove the error harmless beyond a reasonable doubt. *Id.*

B. The prosecutor's argument affected the fairness of the trial and was not harmless.

Because of the very real probability that the jury convicted Mr. Shaw of criminal trespass due to the owner's off-the-premises lack of consent and never reached the question of JN's credibility or what Mr. Shaw knew about any revocation of her consent – questions central to the second and fourth elements of the crime – the trial on this charge was fundamentally unfair and in violation of Mr. Shaw's due process

rights. *See Holland v. State,* 91 Wis. 2d 134, 138, 280 N.W.2d 288 (1979) (due process requires that the state proves each essential element of the crime beyond a reasonable doubt).

Though Mr. Shaw does not agree with the discussion below regarding the relative strength of the State's evidence on JN's non-consent,[5] the more important issue is that the inquiry into the "quantum of evidence" in support of the conviction should not be driving the plain error analysis here. *Shaw,* NO. 2023AP607-CR, ¶¶22-23. The prosecutor argued that the jury could find, beyond a reasonable doubt, that Mr. Shaw was guilty of trespass based on the owner's non-consent. (88:270). In doing so, the prosecutor relieved the jury of its obligation to reach the central issue in dispute in this case – whether JN revoked her consent and gave the jury a path to conviction contrary to law. In other words, the quantum of evidence regarding JN's non-consent is irrelevant because the jury was informed they could convict without it.

The fact that substantial evidence regarding the owner's non-consent was admitted makes the error more egregious. (*See, e.g.,* 88:159-60, 187, 197, 54:21:25-21:46; 55:23:18-27). The prosecutor's arguments were not idle comments or a slip of the tongue; they were statements regarding the legal

[5] Although not mentioned by the court of appeals, there was also substantial evidence that JN never revoked her consent. *See, e.g.,* 88:193; 55:12:19-12:23; 88:227; 55:23:20-33, 24:24 for evidence in support of JN's consent).

standard necessary to convict. While it is possible that the jury disregarded the prosecutor's explicit citation to evidence that showed Mr. Shaw stayed on the premises after being informed that JN's father did not consent – as well as the explicit instruction that they could find guilt in light of this fact – this is unlikely. (88:270). It is certainly not provable beyond a reasonable doubt. *Mayo,* 301 Wis. 2d 642, ¶43; *see also State v. Dyess*, 124 Wis.2d 525, 540-41, 370 N.W.2d 222 (1985) (the State must prove "that there is no reasonable possibility that the error contributed to the conviction").

This Court should take review to clarify and develop plain and harmless error doctrines based on prosecutorial misstatements of the legal standards. This Court should clarify that when there is a reasonable possibility that the jury applied the wrong legal standard – when there is a reasonable possibility that the conviction is contrary to law – the error is fundamental, substantial and egregious. This Court should take review.

CONCLUSION

For the reasons stated in this petition, this Court should grant review.

Dated this 23rd day of February, 2024.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this petition conforms to the rules contained in §§ 809.19(8)(b) and (bm) and 809.62(4) for a petition produced with a proportional serif font. The length of this petition is XXXX words.

Dated this 23rd day of February, 2024.

Signed:
Electronically signed by
Frances Reynolds Colbert