COURT OF APPEALS DECISION DATED AND FILED

November 16, 2010

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2009AP933-CR

Cir. Ct. No. 2008CF4042

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JASON W. KUCIK,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: DANIEL L. KONKOL, Judge. *Affirmed.*

Before Curley, P.J., Fine and Kessler, JJ.

¶1 CURLEY, P.J. Jason W. Kucik appeals from a judgment of conviction, entered on a jury's verdict, for two counts of possessing a short-

barreled shotgun, contrary to WIS. STAT. § 941.28(2) (2007-08).[1] At the time police officers found two illegal shotguns in Kucik's apartment, they were taking Kucik into protective custody pursuant to a WIS. STAT. § 51.15 emergency detention.[2] The illegal shotguns were not in plain view, but they were discovered after the officers decided to seize, for safekeeping, some legal guns that were stored in a gun cabinet. The removal of the legal guns led to the discovery of the illegal shotguns, which were not previously visible when the officers looked in the gun cabinet. Kucik argues that the officers had no legal basis to seize the legal guns that led to the discovery of the illegal shotguns, and that his pretrial motion to suppress the guns therefore should have been granted.

¶2 At oral argument, the State argued that the legal guns could be seized because they were in plain view and at the time of the seizure the officers had probable cause to believe the guns were evidence of a crime. We agree with the State that even though the trial court did not rely on this reasoning when it denied Kucik's motion to suppress, this reasoning provides an alternate basis to affirm the trial court. We affirm.

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

[2] WISCONSIN STAT. § 51.15(1)(a) provides that a law enforcement officer may detain an individual for evaluation if the officer "has cause to believe that the individual is mentally ill, is drug dependent, or is developmentally disabled" and, as relevant to this appeal, the individual evidences a substantial probability of physical harm to himself or other persons.

I. BACKGROUND.

¶3 Kucik was charged with possessing two short-barreled shotguns that were found in a gun cabinet in his bedroom. He moved to suppress evidence of the guns, alleging their seizure violated his Fourth Amendment rights. Two officers, Kucik's girlfriend (Tammy Hirthe) and Kucik all testified at the suppression hearing.

¶4 Daniel Martinez, a police officer for the City of St. Francis, testified that at 4:45 p.m. on Tuesday, August 5, 2008, he was dispatched to the home of Kucik's cousin, Shane Meyer, who wanted to talk with the officer about an incident that had occurred earlier in the day at a bar operated by Meyer and Kucik. Meyer told Martinez that Kucik had "physically attacked Mr. Meyer unprovoked with a slapjack weapon."[3] Meyer told Martinez that he was concerned about Kucik "because he had been taking a different medication for seizures and they were causing behavioral changes where he would act violently for no reason." Meyer said that Kucik had threatened both Meyer and Meyer's aunt, Carla Young, with physical violence.

¶5 Martinez said Meyer expressed concern for Kucik and wanted to get help for what Meyer believed were delusions. Meyer also told Martinez that Kucik had a large collection of firearms, knives and other weapons.

¶6 Young was present as Martinez spoke with Meyer. Martinez said that Young echoed Meyer's concerns and told Martinez that "she had noticed

[3] Martinez testified that he understood a slapjack to be a batting weapon, similar to a baton.

[Kucik's] behavior changes and she was concerned his medication was causing him to act violently." Young told Martinez that Kucik had threatened, on a previous occasion, "to put a bullet in her head."

¶7 Martinez called for backup and then went to Kucik's apartment, which was located above Meyer's bar, to try to talk with him. The officers tried to make contact with Kucik, who was in the apartment, but they were unsuccessful. Later, they telephoned Hirthe, and she in turn called Kucik and convinced him to come outside to talk to the officers.

¶8 Martinez testified that another officer brought Kucik to Martinez with Kucik already in handcuffs. Martinez said Kucik "seemed confused as to why we were there" and Martinez told him:

> we were concerned for his safety and ... he was in emergency custody, and that we had checked him, found no weapons on him but that we needed to check the apartment ... for any people inside, based on the complaint that we had, that he was making physical threats, threatening to kill people so we needed to check the apartment.

Martinez said that after he "explained that we needed to search the apartment to check for ... anyone who could be inside, anyone injured, ... [Kucik] gave consent."

¶9 Martinez said that he and Officer Rodney Lucht went upstairs to Kucik's apartment. Martinez said they entered and were able to access all but one room in the apartment: a locked bedroom. Martinez said they did not find anyone in the apartment and "[e]verything seemed normal." Martinez testified that Lucht asked Kucik how to open the bedroom door and Kucik indicated he should use a knife.

¶10 Martinez and Lucht entered the bedroom. Martinez said he saw a wood and glass gun cabinet that displayed "several weapons[,] rifles, shotguns, [and] a handgun." Martinez indicated that he did not see any illegal weapons, just "a large amount of weapons." Martinez said he pointed out the guns to Lucht and then went out to his car and proceeded to transport Kucik to the Milwaukee County Mental Heath Complex for evaluation. At the Complex, Martinez completed paperwork for a WIS. STAT. § 51.15 emergency detention of Kucik.[4]

¶11 On cross-examination, Martinez was asked why he chose to do an emergency detention of Kucik rather than arrest him for battering Meyer. Martinez answered:

> Based on the statements that he had taken the medication, that they were worried about the effects of the medication, that they didn't believe him to be in his right mind, Officer Lucht and I decided that getting him help [was important], and that's all the family wanted[,] ... they said they didn't want him arrested, they wanted him to get help.

¶12 Lucht testified that when Kucik first came out of the apartment after his girlfriend convinced him to do so, Lucht and two other officers had their weapons drawn and told Kucik to show his hands. After Kucik complied, one officer handcuffed Kucik. Lucht said that after he and Martinez explained to Kucik what was going on and got his permission to search the apartment, Lucht and Martinez entered the apartment "to look around for people."

---

[4] Martinez did not testify about the WIS. STAT. § 51.15 proceedings that occurred after he delivered Kucik to the Mental Health Complex. However, trial counsel asserted at the motion hearing that Kucik "was let go right away" and that "[t]here was no diagnosis of mental illness or anything else." The State does not contest this.

¶13 Lucht said they "cleared everything that we could," determining that there were no people present in each of the rooms, except they were not able to access a locked bedroom. Lucht exited the apartment and went to talk to Kucik, who was seated in the back of the squad car. Kucik told Lucht how to use a knife or screwdriver to unlock the knob and Lucht returned to the apartment to open the bedroom door.

¶14 Lucht successfully opened the door and he and Martinez entered the bedroom. Lucht said he saw the gun cabinet, which contained "a lot of guns, some knives." Lucht explained that based on "the nature of the call [and] the seriousness of the threats," he "felt it was necessary to take those items for safekeeping, [so] that no one would get hurt with them until we could get Mr. Kucik checked out and evaluated mentally."

¶15 Lucht said he opened the unlocked gun cabinet, removed the guns and knives and put them on the bed. He said he recovered "shotguns, some rifles and then some knives, throwing knives, a butterfly knife and the two short[-barreled] shotguns." Lucht took all of the items from the apartment and secured them at the police station.

¶16 On cross-examination, Lucht acknowledged that when he first looked at the gun cabinet, he did not see anything illegal in the cabinet. He also said that neither Kucik nor Hirthe had given the officers permission to take the guns, open the gun cabinet or "go through the gun cabinet at all." Further, he indicated he had not told Kucik that he was looking for anything other than people in the apartment.

¶17 Kucik and Hirthe gave testimony that differed from the officers' testimony in several ways. Hirthe testified that she did not agree to have the police do a mental health and welfare check on Kucik, and that she did not believe Kucik had mental health problems. She said she agreed to call Kucik because she surmised Kucik did not hear the officers knocking on the door.

¶18 Hirthe testified that she had never seen Kucik appear to have hallucinations or delusions. Finally, she said that the gun cabinet was always kept locked.

¶19 Like Hirthe, Kucik testified that the gun cabinet was kept locked and that he had not unlocked it that day. Kucik said he did have a fight with Meyer on the day he was detained, but he denied that he ever struck Meyer. Kucik denied that he had ever had hallucinations or paranoid delusions and said he does not take medication for mental illness. He acknowledged that he does take medication for epilepsy.

¶20 Kucik said that after he came out of his apartment and was placed in handcuffs, the officers asked if they could search the apartment for hostages. Kucik said he agreed and later told one of the officers how to enter the bedroom. Kucik said that he gave them permission to search "[b]ecause they wanted to look for hostages," and that "[t]he whole time, I was still trying to figure out what was going on." Kucik said he did not give the officers permission to go into the gun cabinet.

¶21 The trial court stated that it had weighed the credibility of the witnesses and proceeded to make factual findings that were consistent with the officers' testimony. It found that Meyer and Young had given the officers information to support an emergency detention, and that the officers

> then proceeded to go to [Kucik's] home to effect an emergency detention as Mr. Meyer indicated he did not want the defendant pursued for any type of criminal activity such as battery but [he] was certainly concerned about [Kucik's] mental status and was fearful of what might be happening to himself in regards to [Kucik's] current mental state.

¶22 The trial court found that Kucik gave the officers permission "to go in to check for people" and later told the officers how to enter the locked room. The trial court found that both officers saw the gun cabinet contained guns and knives, but "testified very truthfully" that they did not see any short-barreled shotguns. The trial court found that it was not until one of the officers opened up the gun cabinet—which the court found was unlocked—removed the guns and placed them on the bed that the officer "discovered that there were two short-barreled shotguns."

¶23 Based on these facts, the trial court found that the officers had a reasonable basis to detain Kucik under WIS. STAT. § 51.15. It also found that Kucik voluntarily consented to having his apartment searched for people. The trial court concluded that at the time the officers saw the gun cabinet, they had a legitimate reason for being in the bedroom. It concluded that because the short-barreled shotguns were not in plain view, they could not have been seized as contraband, but it found that the *illegal* shotguns were legitimately discovered when the officers removed the *legal* guns to be "used as evidence with regard to the emergency detention situation where there were threats to use guns and make those threats more credible." Accordingly, the trial court denied the motion to suppress.

¶24 The case proceeded to trial and Kucik was convicted. He was sentenced to probation on both counts, with jail time imposed and stayed. This appeal follows.

Standard of Review

¶25 "Review of an order granting or denying a motion to suppress evidence presents a question of constitutional fact, which we review under two different standards." ***State v. Hughes***, 2000 WI 24, ¶15, 233 Wis. 2d 280, 607 N.W.2d 621. "We uphold a [trial] court's findings of fact unless they are clearly erroneous. We then independently apply the law to those facts *de novo*." ***Id.*** (citations omitted).

II. ANALYSIS.

¶26 At the outset, it is important that we recognize precisely what Kucik is, and is not, challenging on appeal. Kucik is not challenging the trial court's factual findings, including the trial court's finding that Kucik voluntarily consented to the search of his apartment. Kucik is also not asserting that there was an insufficient basis for the officers to detain him under WIS. STAT. § 51.15. Finally, Kucik is not challenging the trial court's legal conclusion that once the illegal short-barreled shotguns were discovered, they could be seized as illegal weapons in plain view. What Kucik is asserting is that the officers did not have a legal basis to seize the legal guns in the gun cabinet, and that the short-barreled shotguns that were inadvertently discovered when the legal guns were seized should be suppressed as "fruit of the poisonous tree." *See* ***State v. Knapp***, 2005 WI 127, ¶24, 285 Wis. 2d 86, 700 N.W.2d 899 (exclusionary rule "excludes derivative evidence under certain circumstances, via the fruit of the poisonous tree

doctrine, if such evidence is obtained 'by exploitation of that illegality'") (quoting ***Wong Sun v. United States***, 371 U.S. 471, 485-88 (1963)).

¶27 In its appellate brief, the State argued that we should uphold the trial court's order denying Kucik's motion to suppress because the legal guns "were evidence relevant to the [WIS. STAT. ch.] 51 proceedings."[5] At oral argument, the State offered a different basis to affirm, arguing that the legal guns could be seized as evidence of a crime. We agree with the State's alternate basis to affirm the trial court and, on that basis, we affirm. We do not consider the merits of whether police officers can seize guns as evidence to be used in a WIS. STAT. ch. 51 proceeding. *See* ***State v. Blalock***, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) (cases should be decided on the "narrowest possible ground").

A. Seizure of legal guns as evidence of a crime.

1. Whether this basis to affirm should be considered where it was raised for the first time at oral argument.

¶28 For the first time at oral argument, the State offered a basis to affirm the trial court's order denying the motion to suppress that was not relied upon by the trial court. Specifically, the State argued that the legal guns, which were in

---

[5] Notably, the State indicated at oral argument that it was not relying on the theory that the legal guns could be seized for safekeeping, which was the officer's subjective reason for seizing the legal guns. Such a seizure would be potentially problematic under the Fourth Amendment, the State explained, because Kucik had already been detained and, in fact, may have already been en route to the Mental Health Complex at the time the legal guns were seized.

Also, in its brief the State acknowledged that the seizure of the legal guns could not be justified as a seizure pursuant to a protective sweep. *See* ***State v. Sanders***, 2008 WI 85, ¶32, 311 Wis. 2d 257, 752 N.W.2d 713 (An officer may perform "a warrantless protective sweep when the officer possesses 'a reasonable belief ... that the area swept harbored an individual posing a danger to the officer or others.'") (citation omitted).

plain view, could be seized as evidence of a crime (i.e., disorderly conduct, threats and/or battery). We requested supplemental briefing on this issue, including on the issue of whether we should consider this argument even though it was raised for the first time at oral argument.

¶29 Kucik argues that we should not consider the State's new basis to affirm the trial court's denial of his motion to suppress. He directs our attention to ***A.O. Smith Corp. v. Allstate Insurance Cos.***, 222 Wis. 2d 475, 588 N.W.2d 285 (Ct. App. 1998), where we discussed the merits of considering an issue raised for the first time at oral argument. *See* ***id.*** at 490-94. We concluded: "[A] party may be precluded from raising an issue at oral argument that was not presented in its appeal brief." ***Id.*** at 491. However, we added:

> We underscore that waiver is a rule of administration only. There may be an occasion where the appellate court may choose to decide an issue not raised in the briefs, but raised at oral argument. *If the court is of the opinion that the issue was fairly debated at oral argument such that fundamental fairness was not violated, the court may choose to address the issue*. The court decides in each individual case whether the situation warrants relief from the waiver rule.

Id. at 493 (emphasis added). Kucik argues that the State should be precluded from arguing the "evidence of a crime" issue because not only was it not raised in the State's appellate brief, it was also not raised in the trial court.[6] Kucik contends: "The issue was raised for the first time ever at oral argument and therefore pursuant to well[-]settled case law [it] is both waived and abandoned."

---

[6] In contrast, the issue we declined to consider in ***A.O. Smith Corp. v. Allstate Insurance Cos.***, 222 Wis. 2d 475, 588 N.W.2d 285 (Ct. App. 1998), had been raised at the trial court, not mentioned in the appellate brief and raised again at oral argument. *See* ***id.*** at 490-91.

¶30 The State urges us to exercise our discretion and consider the argument it raised for the first time at oral argument. It asserts that both parties have had an opportunity to address the issue in supplemental briefs and that fundamental fairness is therefore not violated. *See **id.*** It also notes that it is relying "only on facts presented at the evidentiary hearing and the trial court's factual findings on the suppression motion." Finally, the State argues that consideration of the issue is consistent with ***State v. Holt***, 128 Wis. 2d 110, 382 N.W.2d 679 (Ct. App. 1985), *superseded by statute on other grounds by* WIS. STAT. § 940.225(7), *as recognized in* ***State v. Grunke***, 2008 WI 82, ¶33, 311 Wis. 2d 439, 752 N.W.2d 769. ***Holt*** recognized that "[i]t is well-established that if a trial court reaches the proper result for the wrong reason, it will be affirmed." ***Id.*** at 124.

¶31 We agree with the State that it is appropriate for us to consider the alternate basis to affirm the trial court that the State raised for the first time at oral argument. Kucik was given an opportunity to address the merits of the State's argument in supplemental briefing. Given that fact, as well as the principle articulated in ***Holt*** that "[a]n appellate court may sustain a lower court's holding on a theory or on reasoning not presented to the lower court," *see **id.*** at 125, we elect to decide this issue and will not apply waiver, *see* ***A.O. Smith***, 422 Wis. 2d at 493.

2. <u>Merits of the State's argument that Kucik's threats provided probable cause justifying the warrantless seizure of the legal guns</u>.

¶32 The State relies on the plain view doctrine to justify seizure of the legal guns. Pursuant to that doctrine:

> Seizure and inspection of evidence without a warrant is justified when the officer is lawfully in a position to observe the evidence, the evidence is in plain view of the officer, the discovery is inadvertent,[7] and "[t]he item seized in itself or in itself with facts known to the officer at the time of the seizure, provides probable cause to believe there is a connection between the evidence and criminal activity."

State v. McGill, 2000 WI 38, ¶40, 234 Wis. 2d 560, 609 N.W.2d 795 (citation omitted). The State argues that the plain view doctrine is applicable here for the following reasons:

> At the time of the seizure of the lawful firearms, the police had consent to be in the apartment and the legal firearms were visible in plain view through the glass doors of the gun cabinet. The relevant facts known to the police at the time of the search were: Kucik had committed an unprovoked physical attack with a slapjack weapon on Meyer that day; at an earlier time Kucik had threatened to put a bullet in Young's head; Kucik had previously threatened Meyer and Young with physical violence; Kucik maintained a large collection of firearms and other weapons.
>
> The police had probable cause to believe that by verbally threatening to put a bullet through Young's head, Kucik had committed the crime of disorderly conduct. A verbal threat to kill or physically harm another individual can constitute disorderly conduct within the meaning of [WIS. STAT.] § 947.01 because a violent threat may tend to disrupt good order by causing the listener to be concerned

[7] There is some question whether inadvertent discovery remains a requirement for application of the plain view doctrine. In ***State v. Guy***, 172 Wis. 2d 86, 492 N.W.2d 311 (1992), our supreme court explicitly revised the plain view doctrine by "eliminate[ing] the inadvertence requirement." *See* ***id.*** at 101. However, subsequent Wisconsin Supreme Court cases have continued to list the requirement. *See, e.g.*, ***State v. Carroll***, 2010 WI 8, ¶24, 322 Wis. 2d 299, 778 N.W.2d 1; ***State v. Sanders***, 2008 WI 85, ¶37, 311 Wis. 2d 257, 752 N.W.2d 713; ***State v. McGill***, 2000 WI 38, ¶40, 234 Wis. 2d 560, 609 N.W.2d 795. Because Kucik's challenge to application of the plain view doctrine here relates only to the final requirement—that there is probable cause to believe there is a connection between the guns and criminal activity—we do not attempt to resolve whether inadvertence remains a requirement. *See* ***State v. Blalock***, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) (cases should be decided on the "narrowest possible ground").

> about the safety of those threatened. ***State v. A.S.***, 2001 WI 48, ¶¶34-38, 243 Wis. 2d 173, 626 N.W.2d 712. There was probable cause to believe there was a connection between that crime and Kucik's large array of legal firearms. The presence of the legal firearms in Kucik's apartment indicated he had the means to carry out his threat, which made it more likely that he had indeed made the threat to put a bullet through Young's head.

(Footnote omitted.)

¶33 We find the State's reasoning persuasive. Kucik, however, argues that the plain view doctrine is inapplicable for two reasons. First, he argues that the final requirement under the plain view doctrine—that there is probable cause to believe there is a connection between the legal guns and criminal activity—was not satisfied. He contends that the witnesses who provided officers with information were unreliable and provided hearsay evidence that should not have been considered. For instance, he notes that although Meyer told officer Martinez that he was struck by Kucik several times earlier in the day, Martinez did not observe any injuries to Meyer. Also, Martinez did not ask Young specifically when Kucik threatened her. Finally, Kucik's girlfriend told the officers she did not believe he had any mental health issues, which contradicted statements by Meyer and Young. Kucik argues that these examples provide "sufficient reason on the record to believe the hearsay declarants were unreliable and as such the hearsay should not have been considered." In addition, Kucik argues that Young's statements did not provide probable cause because she did not tell the officer when Kucik threatened her or that she feared for her safety. We are not convinced.

¶34 "In determining whether probable cause exists, we may consider the officer's previous experience and also the inferences that the officer draws from that experience and the surrounding circumstances." ***Id.***, ¶42 (citation omitted). We apply an objective standard and we are "not bound by the officer's subjective

assessment or motivation." ***State v. Kutz***, 2003 WI App 205, ¶12, 267 Wis. 2d 531, 671 N.W.2d 660. "The officer's belief may be predicated in part upon hearsay information, and the officer may rely on the collective knowledge of the officer's entire department." ***Id.***

¶35 In this case, the trial court implicitly found Martinez to be a credible witness as it accepted Martinez's assessment that Meyer and Young had provided information that led the officer to believe that Kucik might be a danger to himself or others. This information included Meyer's statement that Kucik had "physically attacked Mr. Meyer unprovoked with a slapjack weapon." It also included Young's statement that Kucik had threatened, on a previous occasion, "to put a bullet in her head." Although Martinez did not ask Young specifically when Kucik made this statement, Martinez testified that he "understood it to be recent."

¶36 This information, which Martinez found credible enough to justify continued investigation into the health and safety of Kucik and other people who might be in his home, constituted probable cause that numerous crimes had been committed, including battery and disorderly conduct. Martinez's experience interviewing witnesses and also the inferences he drew based on that previous experience and the surrounding circumstances provided probable cause to seize the legal guns as evidence of a crime. *See* ***McGill***, 234 Wis. 2d 560, ¶42.

¶37 Kucik's second argument against application of the plain view doctrine is "that the police, if they believed that [Kucik] had committed a crime, could have arrested him, they did not." Kucik also complains that the police did not obtain a search warrant. Kucik has not developed these arguments and has not provided case law in support of his suggestion that application of the plain view doctrine is somehow negated by his assertions. We decline to consider his

arguments further because they are not developed. *See **State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (stating that this court will not address issues on appeal that are inadequately briefed).

¶38 In sum, we reject Kucik's challenges to the application of the plain view doctrine. The legal guns were properly seized pursuant to that doctrine and, therefore, there was no basis to grant Kucik's motion to suppress evidence derived from that seizure.

III. CONCLUSION.

¶39 We affirm the trial court's decision to deny Kucik's motion to suppress evidence, albeit on different grounds than those relied upon by the trial court. Specifically, we conclude that the seizure of the legal guns, which led to the discovery of the illegal shotguns, falls within the plain view doctrine. Kucik's Fourth Amendment rights were not violated. We affirm.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

¶40 FINE, J. (*concurring*). I join the Majority opinion, but write briefly to explain why I believe that it is fully appropriate that we decide the merits of this appeal.

¶41 As the Majority opinion notes, police were called because Jason W. Kucik's cousin, Shane Meyer, said that Kucik had hit him "with a slapjack weapon." Further, Meyer's aunt told an officer at the scene that Kucik had earlier threatened "to put a bullet in her head." The officers handcuffed Kucik and took him for a mental-commitment evaluation rather than arrest him for hitting his cousin or for threatening his cousin's aunt. As the Majority opinion explains, it thus follows that because the officers were lawfully in the room with the glass-covered gun cabinet, they could have then seized the lawful guns in the cabinet as plain-view evidence of Kucik's threat to kill Meyer's aunt. *See* ***State v. Johnston***, 184 Wis. 2d 794, 809, 518 N.W.2d 759, 763 (1994) ("plain view"). Once the lawful guns were taken out of the cabinet, the illegal guns underneath would then have been in plain view. Whether, as the Dissent speculates, Kucik could have been convicted of disorderly conduct is an issue different than whether the police could have arrested Kucik for that crime. As the Majority opinion points out, the police could have arrested Kucik for disorderly conduct. Indeed, given the threats, they would have been derelict had they not removed Kucik from the scene.

¶42 The Dissent would reject our analysis because the State did not make the probable-cause-to-arrest contention until its oral argument and the supplemental briefs we ordered to give Kucik a chance to analyze the State's new argument. But, as the Majority opinion notes, the law is clear that an appellate

court may affirm a circuit court for any reason, irrespective of whether the correct legal argument was made to the circuit court by the respondent on appeal, ***State v. Baudhuin***, 141 Wis. 2d 642, 648, 416 N.W.2d 60, 62 (1987) ("If the holding is correct, it should be sustained, and this court may do so on a theory or on reasoning not presented to the trial court."); *see also* ***State v. Truax***, 151 Wis. 2d 354, 359, 444 N.W.2d 432, 435 (Ct. App. 1989); ***State v. Holt***, 128 Wis. 2d 110, 124, 382 N.W.2d 679, 687 (Ct. App. 1985).

¶43 Further, and most significant here, unlike most cases between private parties, where only interests personal to the parties are involved and forfeiture of an argument or a concession may be consistent with the public interest, this case affects the public interest directly because the State represents the public, not a private party. Accordingly, the State's concession or its forfeiture of an argument does not tie our hands to see that our decision serves the polestar of any ordered society: justice. *See* ***State v. Gomaz***, 141 Wis. 2d 302, 307, 414 N.W.2d 626, 629 (1987) (court need not accept State's retraction of legal argument); ***Bergmann v. McCaughtry***, 211 Wis. 2d 1, 7, 564 N.W.2d 712, 714 (1997) (we are not bound by a party's concessions of law); ***State v. Kruzycki***, 192 Wis. 2d 509, 517–518, 531 N.W.2d 429, 432 (Ct. App. 1995) ("A question of law 'cannot be bargained away by counsel nor shielded from *ab initio* consideration by successive court reviews.'") (quoted source omitted); *cf.* ***State v. Conger***, 2010 WI 56, ¶24, 325 Wis. 2d 664, ___, ___ N.W.2d ___, ___ (circuit court may reject plea bargain agreed to by State and a defendant if it determines that the plea bargain is not "in the public interest").

¶44 As noted, I agree with the ground on which the Majority opinion decides this appeal. There are other grounds to affirm as well, and I discuss them briefly so the Record will be clear as to what is at stake. The lawful guns, visible

behind the cabinet's glass (and behind which were the unlawful guns), were also both: (1) evidence to support the mental-commitment evaluation (as the State argued in its brief), and (2) needed to be secured to preserve the status quo in order to prevent Kucik, if he was released, from using those guns to carry out his threat to shoot his cousin's aunt. The first aspect is a common-sense analysis that reasonably flows from the power officers have to take persons into custody for a mental-commitment evaluation. The second aspect naturally flows from the police's community-caretaker responsibilities. I briefly address these matters in turn.

¶45 WISCONSIN STAT. § 51.15(1)(a)2. permits a "law enforcement officer" to take a person "into custody if the officer … has cause to believe" that the person "is mentally ill … and … evidences … [a] substantial probability of physical harm to other persons as manifested by … violent behavior … or by evidence that others are placed in reasonable fear of violent behavior and serious physical harm … as evidenced by a recent overt act … or threat to do serious physical harm." The officer's "belief" may be founded on "[a] specific recent overt act … or threat to act … which is reliably reported to the officer." § 51.15(1)(b)2. The officer must then transport the person taken into custody to an appropriate detention facility. § 51.15(2). In Milwaukee County, the officer must give to the detention facility "a statement of emergency detention which shall provide detailed specific information concerning the recent overt act … or threat to act." § 51.15(4)(a). The "treatment director …, or his or her designee, shall determine within 24 hours whether the individual shall be detained … and shall either release the individual or detain him or her for a period not to exceed 72 hours after delivery of the individual." § 51.15(4)(b).

¶46 Although there is no Wisconsin case that *in haec verba* permits a law-enforcement officer to take lawful weapons that are in plain view because they are relevant to a detention-assessment by the treatment facility, it is not a great leap of logic and common sense to recognize that the type of weapons (what they are, whether they are operable, and the like) is pertinent evidence that the treatment facility would find helpful in determining within the requisite twenty-four hours whether the person should be detained. Simply put, there is no specific on-all-fours case because the issue has apparently not come up before now. That, of course, is no reason to not decide the issue. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 188, 560 N.W.2d 246, 255 (1997) ("The court of appeals, a unitary court, has two functions. Its primary function is error correcting. Nevertheless under some circumstances it necessarily performs a second function, that of law defining and law development, as it adapts the common law and interprets the statutes and federal and state constitutions in the cases it decides."). In my view, officers taking a person into detention under WIS. STAT. § 51.15 may seize plain-view evidence that is material to a detention assessment, just as officers arresting a person may seize plain-view evidence that is material to the crime for which the person is arrested. That the seizure arises from an underlying "civil" case (WIS. STAT. ch. 51) and not a criminal matter is of no consequence. *See* ***Baudhuin***, 141 Wis. 2d at 650–652, 416 N.W.2d at 63–64 (Where officer had an objectively reasonable basis to stop a driver in order to issue a non-criminal citation, the stop was legal, and evidence leading to a drunk-driving criminal conviction should not have been suppressed.).

¶47 There is another reason why I believe that what the officers did was not only reasonable but also perfectly lawful. As seen from my excerpts of the pertinent provisions of WIS. STAT. § 51.15, a person taken into custody as an

emergency detainee must, if he or she is not to be detained, be released within twenty-four hours. Thus, the officers did not know how long Kucik would be separated from his guns, which, although lawful, could still help him make good on his threat to kill his cousin's aunt, or, indeed, to hurt or kill someone else, including Kucik's cousin. In fact, as we have seen from the Majority opinion, "Kucik 'was let go right away.'"

¶48 "The United States Supreme Court and courts of this state have recognized that a police officer serving as a community caretaker to protect persons and property may be constitutionally permitted to perform warrantless searches and seizures." ***State v. Pinkard***, 2010 WI 81, ¶14 ___ Wis. 2d ___, ___, 785 N.W.2d 592, 597. A police officer's community-caretaker role extends to homes as well as automobiles. ***Id.***, 2010 WI 81, ¶¶20–27, ___ Wis. 2d at___, 785 N.W.2d at 598–601. Further, officers acting under WIS. STAT. § 51.15 may be functioning as community caretakers. *See* ***State v. Horngren***, 2000 WI App 177, ¶18, 238 Wis. 2d 347, 356, 617 N.W.2d 508, 512. As ***Horngren*** recognized: "An arrest, however, does not define the sole context in which a protective sweep can constitutionally occur. Rather, within the purview of a bona fide community caretaker activity, the reasonableness of an officer's actions, evaluated under the totality of the circumstances, determines the constitutionality of the officer's conduct." ***Id.***, 2000 WI App 177, ¶20, 238 Wis. 2d at 357, 617 N.W.2d at 513.

¶49 Under the community-caretaker doctrine, a warrantless search and seizure in a home is valid if "the police were exercising a bona fide community caretaker function; and if so, whether the public interest outweighs the intrusion upon the privacy of the individual such that the community caretaker function was reasonably exercised within the context of a home." ***Pinkard***, 2010 WI 81, ¶29, ___ Wis. 2d at___, 785 N.W.2d at 601 (internal number omitted). In my view,

these tests were met here. Once the officers saw guns with which Kucik could have carried out his threat to kill his cousin's aunt or harm someone else, and not knowing how long Kucik would be isolated from those guns, they acted reasonably and lawfully in at least temporarily securing the guns. Indeed, had they not secured the guns, and had the released-"right away" Kucik returned and put a bullet into his cousin's aunt, everyone would be rightfully outraged.

No. 2009AP933-CR(D)

¶50 KESSLER, J. (*dissenting*). I respectfully dissent. I disagree with the majority's discretionary decision to accept the State's belated justification of the officers' warrantless seizure of admittedly legal weapons. The State now argues that the legal weapons could be seized because the officers had probable cause to believe Kucik had at some earlier time engaged in disorderly conduct, *see* WIS. STAT. § 947.01 (2007-08),[1] by threatening to "put a bullet through [the] head" of a relative. It is the alleged existence of probable cause to believe disorderly conduct occurred upon which the majority's approval of the seizure of the legal weapons depends.

¶51 This is the State's third attempt to justify the warrantless seizure of Kucik's legal weapons,[2] which is the sole basis for discovery of the two illegal guns and Kucik's criminal conviction. I conclude that the State forfeited its right to argue that the guns could be seized as evidence of the crime of disorderly conduct when it failed to raise this argument before the trial court and when it took

---

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

WISCONSIN STAT. § 947.01 provides in relevant part: "Whoever, in a public or private place, engages in violent, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly conduct under circumstances in which the conduct tends to cause or provoke a disturbance is guilty of a Class B misdemeanor."

[2] In its appellate brief, the State argued that we should uphold the trial court's order denying Kucik's motion to suppress because the legal guns "were evidence relevant to the [WIS. STAT. ch.] 51 proceedings."

the opposite position in its appellate brief. Pursuant to ***A.O. Smith Corp. v. Allstate Insurance Cos.***, 222 Wis. 2d 475, 588 N.W.2d 285 (Ct. App. 1998), we have discretion to determine whether the State should be precluded from relying on an argument raised for the first time at oral argument. *See* ***id.*** at 490-94. In my opinion, we should bar the State from making this argument because it was never raised in the trial court and Kucik was thus deprived of the opportunity to develop the record on this issue.

¶52 Furthermore, I conclude that the record as it is currently developed does not support the conclusion that the officers had probable cause to seize the legal guns as evidence of the crime of disorderly conduct.[3] "[T]here are two distinct elements to disorderly conduct—conduct must be of the type enumerated in the statute or similar thereto *and* such conduct must be engaged in under circumstances which tended to cause or provoke a disturbance." *See* ***State v. Zwicker***, 41 Wis. 2d 497, 515, 164 N.W.2d 512 (1969). "This requires that a person's conduct must consist of one of the six enumerated words [in the

---

[3] The lack of record development concerning the officers' decision to seize the legal weapons without a warrant also weighs in favor of not allowing the State to rely on the argument it raised for the first time at oral argument. The State conceded that the legal firearms were seized after Kucik had been secured in a squad car and likely after he was being transported to the mental health facility. The officers had ample time to attempt to obtain a search warrant but chose not do so. There is no explanation for the failure to obtain a warrant. There was obviously no immediate danger to the officers once Kucik was secured and the officers determined no other persons were in his home. There was no likelihood Kucik could access the weapons as he had been physically removed from the scene. There were no other possible exigent circumstances suggested in the record. Another adult shared the dwelling with Kucik, thus minimizing any reasonable community caretaker fear that children or others might inadvertently discover the weapons while Kucik was undergoing evaluation. These facts lead me to question the legality of the seizure without a search warrant, which was an issue not addressed below because the State did not attempt to justify the seizure based on criminal law grounds. The lack of development of this issue weighs in favor of barring the State from raising its new argument.

disorderly conduct statute] or conduct similar thereto *and* such conduct tends to cause or provoke a disturbance." ***Id.***

¶53 Our supreme court, in ***State v. A.S.***, 2001 WI 48, 243 Wis. 2d 173, 626 N.W.2d 712, considered whether pure speech which was not unreasonably loud and was unaccompanied by any physical action could constitute disorderly conduct. *See* ***id.***, ¶11. The court applied the test which it earlier adopted in ***State v. Perkins***, 2001 WI 46, 243 Wis. 2d 141, 626 N.W.2d 762, to determine whether a statement alone is a "true threat":

> "A true threat is a statement that a speaker would reasonably foresee that a listener would reasonably interpret as a serious expression of a purpose to inflict harm, as distinguished from hyperbole, jest, innocuous talk, expressions of political views or other similarly protected speech. It is not necessary that the speaker have the ability to carry out the threat. In determining whether a statement is a true threat, the totality of the circumstances must be considered."

A.S., 243 Wis. 2d 173, ¶22 (quoting ***Perkins***, 243 Wis. 2d 141, ¶29). In order to make the determination of whether a reasonable person would understand the statement as a true threat, ***A.S.*** instructs that:

> [c]onsideration must be given to the full context of the statement, including all relevant factors that might affect how the statement could reasonably be interpreted. To this end, various factors should be considered, including: how the recipient and other listeners reacted to the alleged threat, whether the threat was conditional, whether it was communicated directly to its victim, whether the maker of the threat had made similar statements to the victim on other occasions, and whether the victim had reason to believe that the maker of the threat had a propensity to engage in violence.

Id., ¶22 (citations and internal quotation marks omitted).

¶54 Here, the disorderly conduct probable cause analysis is based solely on Kucik's verbal threat to his aunt, unaccompanied by any reported action toward her.[4] Although uncivil, and possibly upsetting, the threat was apparently perceived by its recipient as indicative only of Kucik's need for medical and mental health assistance that had perhaps been caused by a change in Kucik's seizure medication. Kucik's aunt did not report the statement until the following day and she told the officer that she wanted Kucik evaluated, not prosecuted. This demonstrated attitude by the recipient of the threat does not tend to show that Kucik's statement provoked, or was likely to provoke, a disturbance or an imminent breach of the peace.

¶55 Because the State never previously raised this justification, neither the State nor Kucik had the opportunity at the suppression hearing to develop an adequate factual record from which to determine, as a matter of law, whether Kucik's statement constituted a "true threat." For example, the record does not disclose precisely when the threat was made in relation to when the officer spoke with the witness, nor the circumstances surrounding the statement. Nor does the record disclose facts from which to determine whether or not the threat was merely "innocuous talk" by a person affected by a change in his medication. Here, relative to whether probable cause existed, the record contains only the police reports of the information they received from Kucik's relatives. These reports led the officers not to investigate a possible crime, but instead, at the request of the relatives who reported Kucik's conduct and statements, to take Kucik into

[4] As the majority notes, another relative reported that Kucik hit him with a "slapjack." How the seizure of lawful firearms could be evidence of this battery is unexplained.

protective custody pursuant to a WIS. STAT. § 51.15 emergency detention and transport him to the county mental health facility.

¶56 The surrounding circumstances currently in the record strongly suggest that those who heard the threat did not, as reasonable listeners, interpret Kucik's statements "as *serious* expressions of an intent to intimidate or inflict bodily harm." *See* ***A.S.***, 243 Wis. 2d 173, ¶23 (emphasis added). The record does not, in my view, permit us to determine that, as a matter of law, a "true threat" was uttered. Therefore, I am compelled to conclude that we also cannot determine that probable cause existed to seize the legal weapons. Consequently, because I consider the record inadequate to make the findings which the majority makes, I conclude that suppression of the admittedly illegal weapons should have been granted.