STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2014AP2892

In re: the return of property in: State of Wisconsin v. Steven Michael Leonard:

STEVEN MICHAEL LEONARD,

Appellant,

v.

STATE OF WISCONSIN,

Respondent.

APPEAL FROM THE JUDGMENT OF THE DOUGLAS COUNTY CIRCUIT COURT, THE HONORABLE KELLY J. THIMM PRESIDING

RESPONDENT'S RESPONSE BRIEF

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ISSUE PRESENTED FOR REVIEW

1. Steven Leonard pleaded guilty to "violent, boisterous and otherwise disorderly conduct" under Wis. Stat. § 947.01(1). This Court holds that a conviction under the "violent" element of Wis. Stat. § 947.01(1) is a "misdemeanor crime of domestic violence" entailing a prohibition on possessing a firearm under federal law. Is Leonard barred from possessing a firearm because he has been convicted of a misdemeanor crime of domestic violence?

2. A person has no right to the return of a "dangerous weapon" if he "committed a crime involving the use of the dangerous weapon." Wis. Stat. § 968.20(1m)(b). During the incident that led to his conviction for disorderly conduct, Leonard retrieved his .44 Magnum handgun and threatened to kill himself. Is Leonard entitled to the return of the .44 Magnum?

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is unwarranted because the issues can be adequately addressed in the parties' briefs. Publication is unwarranted because the case involves applying existing rules of law to factual situations that are not significantly different than in existing case law.

STATEMENT OF THE CASE

I. Leonard's disorderly conduct conviction

On February 4, 2014, the State filed a two-count criminal complaint against Appellant Steven Michael Leonard for events that took place the prior day. (R. 1.) Count 1 charged Leonard with one count of "Disorderly Conduct, Domestic Abuse" under Wis. Stat. § 947.01(1) and Count 2 charged "Possession of a Firearm While Intoxicated, Domestic Abuse" under Wis. Stat. § 941.20(1)(b). (R. 1:1.) The disorderly conduct charge alleged that Leonard "engage[d] in violent, boisterous, and otherwise disorderly conduct, under circumstances in which such conduct tended to cause a disturbance." (R. 1:1.) Specifically, the complaint alleged that Leonard "having been drinking alcohol, at 3:30 a.m., kicks in the locked door of his residence, scaring his wife Shauna Leonard, obtains a loaded handgun, and leaves the house threatening to kill himself." (R. 1:1.) During the arrest, officers from the City of Superior Police Department removed several firearms and ammunition from the home, including four long guns, two pistols, and several hundred rounds of ammunition. (R. 1:4.)

On September 17, 2014, Leonard entered a plea of no contest to Count 1, Disorderly Conduct, with the State agreeing to remove the domestic abuse modifier from Count 1 and drop Count 2 entirely. (R.9; R. 17:2-3.) During the plea colloquy, the circuit court read the facts recited in Count 1

that Leonard "did engage in violent, boisterous, and otherwise disorderly conduct under circumstances in which such conduct tended to cause a disturbance." (R. 17:3.) The court also read the specific factual allegations that Leonard "[h]aving been drinking alcohol at 3:30 a.m., kicks in the locked door of his residence, scaring his wife, Shauna Leonard, obtains a loaded handgun, and leaves the house threatening to kill himself." (R. 17:3.) Leonard responded that he pleaded no contest to this charge. (R. 17:3.)

II. Leonard's motion for return of property

On October 23, 2014, Leonard filed a motion for the return of property under Wis. Stat. § 968.20(1) seeking the return of the firearms and ammunition seized during his arrest. (R. 10-11.) Specifically, he requested the return of a Sturm Ruger .44 Magnum, an M83 smoke grenade, a Remington 30-06 bolt action rifle with scope, a Western Field 12 gauge shotgun, a Sig-Sauer .22 pistol, a Smith & Wesson 5.56 semi-automatic rifle with scope, a Raven Arms .25 pistol, a J.C. Higgins model 20 shotgun, along with ammunition for the various guns. (R. 10:3.)

On November 14, 2014, the circuit court held a hearing on Leonard's motion. At the hearing, the State contended that Leonard was not entitled to the return of his property because federal law prevented Leonard from possessing a firearm following his conviction for disorderly conduct. Specifically, the conviction was for a "misdemeanor crime of domestic violence," and 18 U.S.C. § 922(g)(9)

(often referred to as the Lautenberg Amendment) prevents anyone convicted of a "misdemeanor crime of domestic violence" from possessing a firearm. (R. 18:20-21.) The circuit court agreed that the conviction was for a "misdemeanor crime of domestic violence" and therefore denied Leonard's motion. (R. 18:20-21.) In the alternative, the court ruled that Leonard was not entitled to the return of the firearms under Wis. Stat. § 928.20(1m)(b) because they had been used in the crime. (R. 18:21-22.) The circuit court ruled that Leonard was entitled to the return of his smoke grenade because the State agreed that it was not a firearm. (R. 18:22.)

On November 17, 2014, the court entered a written order denying Leonard's motion on the grounds that he had been convicted of a misdemeanor crime of domestic violence. (R. 12.) Leonard has appealed that ruling to this Court.

ARGUMENT

I. Standard of Review

The standard of review is *de novo* because this case involves "interpreting statutes and applying those statutes to undisputed facts." *In re Estate of Felhofer*, 2014 WI App 6, ¶ 11, 352 Wis. 2d 380, 843 N.W.2d 57.

II. Leonard cannot possess a firearm because he has been convicted of a misdemeanor crime of domestic violence.

Under recent precedent from this Court, Leonard is prohibited from possessing a firearm because he was convicted of a "misdemeanor crime of domestic violence" under 18 U.S.C. § 922(g)(9). Federal law defines a "misdemeanor crime of domestic violence" as a crime that "has, as an element, the use or attempted use of physical force . . . committed by a current or former spouse, parent, or guardian of the victim." 18 U.S.C. § 921(a)(33)(A). Leonard's crime meets both the use of "force" and relationship-to-the-victim requirements of the federal statute.

Regarding the use of force, this Court held that a conviction under Wis. Stat. § 947.01(1) is a misdemeanor crime of domestic violence when the defendant is convicted under the "violent" conduct element, just as Leonard was in this case. *Evans v. Wis. Dep't of Justice*, 2014 WI App 31, ¶ 10, 353 Wis. 2d 289, 844 N.W.2d 403. Even though Leonard cites the *Evans* decision in his brief, he fails to see that the case conclusively resolves this appeal.

The victim of Leonard's crime was his wife, which clearly satisfies the relationship-to-the-victim test.

A. Because Leonard pled to the "violent" element of Wis. Stat. § 947.01(1), his crime was a misdemeanor crime of domestic violence.

Leonard pled to a violation of the "violent" conduct element of Wis. Stat. § 947.01(1). Under *Evans*, that means he was convicted of a misdemeanor crime of domestic violence that bars him from possessing a firearm under federal law.

Wisconsin Stat. § 947.01(1) provides:

> [w]hoever, 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.

The crime has "two elements: (1) engaging in conduct of a type or types enumerated, and (2) doing so under circumstances in which that conduct tends to cause or provoke a disturbance." *Evans*, 353 Wis. 2d 289, ¶ 10. The first element "allows for alternatives," such that a person could be convicted for engaging in any of one the listed types of conduct (violent, abusive, *etc.*) or several of them at the same time.

In *Evans,* this Court held that a conviction under Wis. Stat. § 947.01(1) qualifies as a misdemeanor crime of domestic violence when the defendant is convicted under the "violent" conduct alternative. The court reasoned that "[b]ecause 'violent' conduct necessarily implies the use of

physical force," that alternative meets the federal definition of a misdemeanor crime of domestic violence. *Evans*, 353 Wis. 2d 289, ¶ 12.

Here, Leonard was convicted under the "violent" conduct alternative—"violent, boisterous and otherwise disorderly conduct" (R. 18:3)—and therefore his conviction qualifies as a misdemeanor crime of domestic violence. Leonard's conviction for "violent" conduct is established by the criminal complaint and the plea colloquy transcript, documents that fall within the "limited class of documents" a court can consider. *Evans*, 353 Wis. 2d 289, ¶ 18 (quoting *Descamps v. United States*, --- U.S. ---, 133 S. Ct. 2279, 2281 (2013)).

The conviction at issue here is practically identical to the one in *Evans*. In that case, the defendant pleaded guilty to "disorderly conduct based on a first element specified as 'violent, abusive and otherwise disorderly conduct.'" *Id.* ¶ 12. In this case, Leonard pleaded guilty to disorderly conduct based on "violent, boisterous, and otherwise disorderly conduct." (R. 17:2.) While the *Evans* court noted the issue that could arise when a defendants pleads guilty to violent *or* otherwise disorderly conduct, it is "a relatively easy case" that the conviction is for a misdemeanor crime of domestic violence when a conviction is based on violent *and* otherwise disorderly conduct. *Evans*, 353 Wis. 2d 289, ¶ 20.

B. Leonard's wife was the victim of his crime.

Leonard's conviction also satisfied the relationship to the victim requirement because he is the husband of the victim.

To prove this part of the test for a "misdemeanor crime of domestic violence," the State "must prove beyond a reasonable doubt that the victim of the predicate offense was the defendant's current or former spouse . . . . But that relationship, while it must be established, need not be denominated an element of the predicate offense." *United States v. Hayes*, 555 U.S. 415, 426 (2009). In this case, Leonard's wife was the victim of his crime because Leonard agreed at the plea hearing that he had "kick[ed] in the locked door of his residence, *scaring his wife Shauna Leonard*, obtain[ed] a loaded handgun, and [left] the house threatening to kill himself." (R. 17:2 (emphasis added).)

While Leonard contends that there was no victim in this case, *Evans* makes clear that disorderly conduct can have a victim. *See id.* ¶¶ 26-30. Disorderly conduct requires "circumstances in which the conduct tends to cause or provoke a disturbance." Wis. Stat. § 947.01(1). The victims of disorderly conduct are those who suffer from the conduct that tends to provoke a disturbance. Here, the victim was Leonard's wife, who was scared by Leonard's actions in kicking in the locked door, obtaining the handgun, and threatening to kill himself.

C. Leonard misapplies the categorical approach to Wis. Stat. § 947.01(1).

Leonard's argument is based on a fundamental misunderstanding of the "categorical approach" that the U.S. Supreme Court uses to determine whether a particular crime is a "misdemeanor crime of domestic violence." In that approach (explained in *Evans*), the court looks to fact of the conviction and the statutory definition of the offense. *Evans*, 353 Wis. 2d 289, ¶ 18 (citing *Shepard v. United States*, 544 U.S. 13, 17 (2005)). If the crime has "as an element, the use or attempted use of physical force" it is a misdemeanor crime of domestic violence; if it does not meet that test, then it is not.

When a statute defines elements in the alternative, a court applies the "modified categorical approach" to determine which alternative formed the basis of conviction. *Evans*, 353 Wis. 2d 289, ¶ 18 (citing *Descamps* 133 S. Ct. at 2281). The court looks to the "limited class of documents" such as the criminal complaint and the plea colloquy transcript to make that determination. *Id.*

Wisconsin Stat. § 947.01(1) defines elements in the alternative: there is both a violent and non-violent way in which the crime can be committed. The "limited class of documents," including the criminal complaint and the plea colloquy, confirmed that Leonard was convicted under the "violent" conduct alternative of disorderly conduct.

Under *Evans*, such a conviction always meets the standard for the "use of force"' regardless of whether the underlying conduct involved kicking in a door or some other conduct not present in this case. Leonard's argument about the marital property status of the family home's door is simply irrelevant.

D. The *Castleman* decision does not help Leonard.

The U.S. Supreme Court's decision in *United States v. Castleman*, --- U.S. ---, 134 S. Ct. 1405 (2014) does not change the analysis in *Evans*. *Castleman* held that "the requirement of 'physical force' is satisfied, for purposes of § 922(g)(9), by the degree of force that supports a common-law battery conviction." *Id.* at 1413. The court did not hold that the "use or attempted use of physical force" prong can be satisfied only by crimes that meet the test for common law battery. Put differently, the *Castleman* court decided that conduct that supports a common law battery conviction is sufficient to establish a misdemeanor crime of domestic violence, but it did *not* rule that such conduct was necessary.

Prior to *Castleman*, the U.S. Supreme Court held that "the word 'violent' or 'violence' standing alone 'connotes a substantial degree of force.'" *Id.* at 1411 (quoting *Johnson v. United States*, 559 U.S. 133, 140 (2010)). This holding came in cases interpreting similar "use of force" language in the definition of "violent felony" in the Armed Career Criminal Act. *Johnson*, 559 U.S. at 140. Because Leonard was

convicted of "violent" conduct under Wis. Stat. § 947.01(1), he was convicted under a statute that connotes "a substantial degree of force" under the U.S. Supreme Court's application of the categorical approach. *Johnson*, 559 U.S. at 140. The *Evans* court agreed with this reasoning when it held that "'violent' conduct necessarily implies the use of physical force." 353 Wis. 2d 289, ¶ 12.

In *Castleman*, the Court expanded the notion of the "use of force" in the domestic violence context to include "[m]inor uses of force [that] may not constitute 'violence' in the generic sense." 134 S. Ct. at 1412. The statute at issue in *Castleman* criminalized "intentionally or knowingly causes bodily injury to another." *Id.* at 1409 (citing Tenn. Code. Ann. § 39-13-111(b)). Lower courts had held that this crime did not have "the use or attempted use of physical force" as an element because someone could cause a slight bodily injury with conduct that would not be described as violent. *Id.* at 1409-10. The Supreme Court reversed, holding that the "use or attempted use of force" in the domestic violence context extends beyond the violent force necessary in the ACCA to include any offensive touching based on an expansive understanding of domestic violence *Id.* at 1410-13.

Leonard's conviction satisfied the higher, pre-*Castleman* standard. He cannot use *Castleman*'s expansion of the definition of "force" in the domestic violence context to avoid the consequences of a conviction that satisfied the pre-expansion standard.

III. Leonard is not entitled to the return of the .44 Magnum because it was used during the commission of a crime.

Apart from the fact that Leonard is barred from possessing firearms under federal law, Leonard does not meet the requirements of Wis. Stat. § 968.20 for the return of the .44 Magnum.[1] The return of property statute provides that "[i]f the seized property is a dangerous weapon or ammunition, the property shall not be returned to any person who committed a crime involving the use of the dangerous weapon or the ammunition." Wis. Stat. § 968.20(1m)(b). Leonard admits that the .44 Magnum is a "dangerous weapon" by not contesting that fact.

Leonard's disorderly conduct conviction involved "the use of the" .44 Magnum. The Wisconsin Supreme Court defines the phrase "the use of the dangerous weapon" in Wis. Stat. § 968.20(1m)(b) to extend beyond active use to include the mere "'power or ability to use'" the weapon. *Return of Prop. in State v. Perez*, 2001 WI 79, ¶¶ 24-25, 244 Wis. 2d 582, 628 N.W.2d 820 (quoting The American Heritage Dictionary of the English Language 1966 (3d ed. 1992)).

Leonard is completely wrong when he contends that "it is not clear, which event, or combination of events, gave rise to the disorderly conduct conviction."

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[1] This argument does not apply to the firearms and ammunition that Leonard did not actually use during the incident.

(Leonard Br. at 15.) Leonard agreed during the plea colloquy that he "did engage in violent, boisterous, and otherwise disorderly conduct under circumstances in which such conduct tended to cause a disturbance," including "obtain[ining] a loaded handgun, and leav[ing] the house threatening to kill himself." (R. 17:3.)[2] Because the record undisputedly shows that Leonard committed a crime (disorderly conduct) involving the use of the dangerous weapon (the .44 Magnum), he is not entitled to the return of the .44 Magnum under Wis. Stat. § 968.20(1m)(b).

[2] Leonard admits that this "loaded handgun" was the .44 Magnum.

CONCLUSION

For the foregoing reasons, the Court should affirm the decision of the circuit court.

Dated this 4th day of March, 2015.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,765 words.

Dated this 4th day of March, 2015.

BRIAN P. KEENAN
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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 4th day of March, 2015.

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