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OF WISCONSIN

In the Court of Appeals of Wisconsin

District III

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

***Steven Michael Leonard*, Defendant-Appellant**

v.

***The State of Wisconsin*, Plaintiff-Respondent**

Appeal No. 2014AP002892

Appeal from the Judgment of the Douglas County Circuit Court, The Hon. Kelly J. Thimm

Reply Brief of Appellant

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Argument

The State advances the startling position that a misdemeanor crime of domestic violence ("MCDV") under 18 U.S.C. § 922(g)(8) does not actually require violence directed at the "victim" of the crime. Leonard will show the Court that this counterintuitive position has no basis in law, has never been recognized in any court, and is contrary to precedent of the Supreme Court of the United States.

Leonard also will show that the State does not dispute Leonard's position that the State never argued before the Circuit Court that Leonard used a firearm in the commission of a crime, that the State may not raise this issue for the first time on appeal, and that Leonard was at a minimum entitled to notice that the Circuit Court intended to rule on this issue not raised by the State.

I. The "Violence" in a Misdemeanor Crime of Domestic Violence Must Be Directed at the "Victim" of the Crime

The State asserts that a disorderly conduct conviction for violent behavior necessarily is a conviction of a MCDV under 18 U.S.C. § 922(g)(9). As grounds for this position, the State cites *Evans v. Wisconsin Department of Justice*, 2014 WI App 31, ¶ 10, 353 Wis. 2d 289, 844 N.W.2d 403. In this analysis, the State throws out the window any kind of requirement of a victim, a relationship of the victim to the perpetrator, or that the violence be directed at the victim. Taking the State's argument at face value, disorderly conduct involving violence is *per se* a

MCDV. State Brief, p. 6 ("Because Leonard pled to the "violent" element of Wis.Stat. § 947.01(1), his crime was a misdemeanor crime of domestic violence.")

Of course that is not what *Evans* says, and it is difficult to believe that that is even what the State means. For the point that the State is attempting to make, *Evans* only stands for the proposition that the "violence" necessary to commit disorderly conduct is sufficient to satisfy the "use of force" element of § 922(g)(9). *Evans*, ¶ 12. That the state thinks this alone makes a violent disorderly conduct a MCDV is inexplicable.

Evans analyzes MCDVs as having two elements, as outlined by the Supreme Court of the United States in *United States v. Hayes*, 555 U.S. 415, 426 (2009). *Evans*, ¶ 5. First, there must be the use of force. *Id.* Second, the force must be committed by a person who has a specified domestic relationship with the victim. *Id.* The State, in declaring Leonard's use of violence as constituting a MCDV, ignores the second element, the need for a victim and the relationship of the victim to the perpetrator ***and to the violence.***

The State's excessive reliance on the "violence" component of Leonard's disorderly conduct conviction is the State's undoing. There is no dispute that Leonard committed an act of violence, because he admitted to it. He even discussed it in his opening Brief. But the only violent act Leonard committed was the kicking in of his own house door. Leonard asserts this in his opening Brief and the State fails to refute or rebut that assertion in any way.

Under the first part of the two-part *Hayes/Evans* analysis, Leonard committed a violent act, which, standing alone, satisfies the "use of force" element of § 922(g)(9). But this element is self-evident and merits no significant discussion. This case hinges on the second part of the test: the victim.

The State asserts that Leonard's wife, Shauna, was the victim of the violence because she was scared. This argument is wrong for several reasons.

First, it is self-evident that a "misdemeanor crime of domestic violence" is intended to cover things like battery of a spouse or other domestic partner. Violence not directed at a person is simply outside the bounds of what a reasonable person would think is included, and the State has shown this Court nothing to indicate anything more is included. The text of the statute requires either the use of physical force or the threatened used of a deadly weapon. 18 U.S.C. § 921(a)(33)(A)(ii). It would be nonsensical to include the victim requirement if the force or threat did not have to be directed at the victim. What if a man threatened a burglar with a gun and it scared the man's wife? If the man were convicted of some misdemeanor as a result, the threat of use of a deadly weapon and the scared wife are all the State would require to ban ownership of firearms for the man.

Second, the State fails to cite to a single case, from any court, in any state, where a person was declared to have committed a MCDV against a victim solely on account of the victim's being scared by a violent act ***not directed at the victim.*** The existence of such a case would provide some support for the State's dubious

claim, so surely the State looked for one, and looked hard. Presumably, if such a case existed, the Wisconsin Department of Justice could find it. Leonard's counsel has looked for such a case and cannot find one. Thus, the State's theory is one of first impression, not just for this Court, but for the entire nation.

Third, even if there were such a case, recent U.S. Supreme Court precedent would cast serious doubt on its status. Just last year, the Court found that the violence in a MCDV case must be directed at the victim. *United States v. Castleman*, ___ U.S. ___, 134 S.Ct. 1405, 1416 (2104) (Congress did not intend § 922(g)(9) to be "triggered by offenses in which no force at all was directed against a person.")

Fourth, the State asserts, without support, that the victim of a disorderly conduct is the person who suffers from the conduct that tends to provoke a disturbance. The federal law does not define a victim in the MCDV context, so the ordinary use of the word should apply. A victim is:

> The person who is the object of a crime or tort, as the victim of a robbery is the person robbed. Person who court determines has suffered pecuniary damages as a result of defendant's criminal activities….

Black's Law Dictionary, 6th Edition. This definition is consistent with *Castleman* and common sense. If Shauna had been the object of Leonard's kicking, rather than the door, this would be a different case. But there was no person who was the object of the violence. The State failed to prove that anyone suffered any pecuniary damages (in fact the State claims a discussion of that is irrelevant in this

case). The State only points to Shauna's frightened state, and even then fails to show that the kicking in of the door cause the fright, as opposed to the obtaining of the revolver.

Consider the logical extension of the State's position. If all it takes to constitute a MCDV is something that constitutes a state misdemeanor that includes violence and scaring a household member[1], then the State's position would lead to absurd results.

Example 1. A father and his children encounter a deer in their garage. The deer jumps about, trying to find a way out. The father panics out of fear for his children and shoots the deer, scaring the children in the process. The father is convicted of a misdemeanor hunting violation. The violation was violent, as it involved discharging firearms and bloodshed (by the deer). The perpetrator's children were scared. The State of Wisconsin would call this a MCDV.

Example 2. Two teenage siblings are working in the household garden and one of them is startled by a snake. He loudly utters a string of profanities as he hacks at the snake with a hoe. His sister is scared by the encounter. He is convicted of disorderly conduct (for being loud, boisterous, profane, and violent). The State of Wisconsin would call this a MCDV.

Example 3. A man gets into a quarrel with his next door neighbor about the neighbor's dog running loose. The quarrel escalates and the man strikes the

[1] Leonard acknowledges that "household member" may not be exactly coincident with the range of potential victims for a MCDV, but he nonetheless uses that phrase for the sake of expediency. He does not use any examples of household members in this brief that would not satisfy the statutory relationship requirement.

neighbor. The man's wife is frightened by the incident. The man is convicted of simple battery against the neighbor. The State of Wisconsin would call this a MCDV.

Even in *Evans*, the case heavily relied upon by the State, the perpetrator admitted to having shoved his daughter. *Evans*, ¶19, FN 5. In the present case, the criminal complaint is replete with statements that Leonard neither directed threats nor violence against Shauna, and Shauna herself says Leonard did not assault her. The State's only witness at the hearing testified that Leonard did not harm nor threaten Shauna.

Section 922(g)(9) applies only when violence is directed at the victim. The criminal complaint shows no violence directed at Shauna, and the State' own evidence shows that no violence was directed at Shauna. Under *Castleman*, there was no MCDV and it was error for the Circuit Court to rule otherwise.

II. Leonard Did Not Use the Revolver to Commit a Crime

The State does not dispute (and it therefore concedes) that it had the burden of proof at the hearing on Leonard's petition to return his property. The State also does not dispute that it did not introduce evidence of, nor argue for, a ruling that Leonard used the revolver in the commission of a crime. Nevertheless, the State argues for the first time on appeal that this was the case.

The State appears to think that anything mentioned in the criminal complaint necessarily must be part of the crime. In trying to show that Leonard used violence for a MCDV, the State focuses on the only violent act Leonard

committed, kicking in his own door. But when trying to show that Leonard used a firearm to commit a crime, the State conveniently ***omits altogether*** any mention of the kicking in of the door. In that context, the State speaks only of Leonard "obtaining a loaded handgun, and leaving he house threatening to kill himself." State Brief, p. 13.

The State fails to address Leonard's point that carrying a loaded handgun, without malicious or criminal intent, cannot constitute disorderly conduct. Wis.Stats. § 947.01(2). The Circuit Court did not find that Leonard had any malicious or criminal intent, the State did not introduce evidence of any malicious or criminal intent, and the State did not argue before the Circuit Court or this Court that Leonard had any malicious or criminal intent. Simply put, under Wisconsin law the obtaining the handgun cannot constitute disorderly conduct. Including the handgun in the criminal accusation cannot change that, and Leonard cannot have been convicted of disorderly conduct on account of the handgun.

Adding gratuitous facts to a criminal complaint changes nothing. The kicking in of the door was violent, boisterous, and otherwise disorderly, and Leonard pleaded guilty to that. The fact that after he committed the disorderly conduct, Leonard went upstairs and obtained a handgun does not mean that Leonard used the handgun to kick in the door.

The State makes no attempt to explain how getting the handgun was violent, boisterous, or otherwise disorderly, nor can it. Under Wisconsin law,

getting the handgun is not disorderly, and adding that fact to the criminal complaint does not make it so.

The State also fails to rebut Leonard's argument that confiscation of his revolver could work an excessive fine against him. The State did not argue for confiscation of the revolver – it only argued that Leonard is prohibited under federal law from possessing firearms. The difference is an important one.

If Leonard is only prohibited from possessing firearms, then he still is the beneficial owner of his firearms and is entitled to the proceeds from the sale of them, or otherwise to have a say in their disposition. If, on the other hand, the revolver is confiscated as contraband on account of it being used in a crime, then Leonard is deprived of the value of the firearm altogether. Because the State never argued for forfeiture of the revolver, it was inappropriate for the Circuit Court to order its forfeiture. Moreover, the State should not be heard to argue for forfeiture for the first time on appeal.

Conclusion

For the foregoing reasons, the judgment of the circuit court should be reversed, with instructions to order the return of Leonard's firearms and ammunition to him. At a minimum, all firearms and ammunition save for the revolver and its ammunition should be returned, with instructions for the circuit court to conduct a hearing on whether the revolver was used in the commission of the disorderly conduct.

/s/ John R. Monroe
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Certificate of Service

I certify that on March 6, 2015, I served a copy of the foregoing via U.S. Mail upon:

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Certifications:

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) as modified by the court's order for a brief and appendix produced with a proportional serif font. The length of this brief is 2,607 words.

I certify that the text of the electronic copy of the Reply Brief of Appellant is identical to the text of the paper copy of the Brief of Appellant.

/s/ John R. Monroe

John R. Monroe