STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2015AP002350-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KERRY A. SIEKIERZYNSKI,

Defendant-Appellant.

On Notice of Appeal From a Judgment of Conviction
Entered in Outagamie County,
the Honorable Vincent Biskupic, Presiding

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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TABLE OF CONTENTS

CASES CITED

STATUTES CITED

ISSUE PRESENTED

Was the Evidence Sufficient for the Jury to Convict Siekierzynski of Disorderly Conduct?

Not raised in the trial court.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Because Siekierzynski was convicted of a misdemeanor, this appeal will be decided by a single judge. *See* Wis. Stat. § 752.31(2) and (3). Accordingly, the court's opinion will not be published. Siekierzynski does not request oral argument.

STATEMENT OF THE CASE AND FACTS

This is an appeal from a judgment of conviction entered in Outagamie County, the Honorable Vincent Biskupic, presiding.

The state charged Kerry A. Siekierzynski with disorderly conduct, as an act of domestic abuse, on January 21, 2015. (2). The charge arose out of an argument between Siekierzynski and his ex-wife, A.B.

The case proceeded to a jury trial before the Honorable Vincent R. Biskupic. (22). A.B. testified that she and Siekierzynski were divorced in August of 2014. (22:94; App. 102). They have a child together, who was 22 months old at the time of trial. (22:93; App. 101). A.B. testified that she has primary placement of the child, and that Siekierzynski

has supervised visits, which she supervised. (22:95; App. 103).

On October 11, 2014, A.B. brought their child to Siekierzynski's sister's home for a visit. (22:96; App. 104). A.B. and Siekierzynski began to argue when A.B. started to breast-feed the child. Although they argued, they did not yell or raise their voices. (22:99; App. 107). A.B. testified that she stood up to change the child's diaper, "grabbed a diaper from the diaper bag," and turned around. (22:98; App. 106). She said that Siekierzynski then grabbed her forearm "very hard" and "pushed her to the right." (22:98; App. 106). She told him to stop and not to touch her again. (22:100; App. 108).

A.B. then told Siekierzynski she did not "feel very safe," was "scared" and did not like his "behavior." (22:101; App. 109). She described Siekierzynski as being "really upset" and sobbing about the unfairness of the visitation. (22:101-102; App. 109-110). She said:

> I do remember after he talked about things being unfair he kept sobbing. Then he would get angry again, and he said who are you? And at some point in that part of the conversation he called me a creature, and that's when I started the flight-or-fight response.

(22:102; App. 110).

A.B. said Siekierzynski was "getting very into my personal space," so she began to collect the child's things. (22:102; App. 110). She told Siekierzynski she was going to leave in five minutes if he did not calm down. (22:102; App. 110). A.B. took the child from Siekierzynski's arms and said she needed to leave. Siekierzynski then began to videotape her with his phone. (22:104; App. 112). A.B. testified she felt afraid about his videotaping. (22:104-105; App. 112-

113). She tried to leave through the front door, and he stood in front of the door and told her that she could leave but their son would stay. (22:105; App. 113). She attempted to leave through the front and back door, with the child. At that point, Siekierzynski said he was calling "CPS" to tell them that A.B. was interfering with his court-ordered visitation time. (22:107; App. 115). A.B. left with the child while he was on the phone. (22:108; App. 116).

A.B. drove away with the child, and called the police. (22:109; App. 117). Officer James Gray went to the residence and found Siekierzynski sitting outside near the front door crying. (22:125-126; App. 133-134). Siekierzynski told Gray he and his ex-wife had had an argument because he had wanted to change his child's diaper and that A.B. did not want him to. (22:126; App. 134). He admitted to Gray that he had stood in front of the door when A.B. said she wanted to leave. (22:126; App. 134).

Based on this evidence, the jury convicted Siekierzynski of disorderly conduct. (22:188). Judge Biskupic withheld sentence and placed Siekierzynski on probation.

Siekierzynski filed a notice of intent to pursue postconviction relief, and a notice of appeal. (15; 19).

ARGUMENT

The Evidence Was Insufficient for the Jury to Convict Siekierzynski of Disorderly Conduct.

Upon a challenge to the sufficiency of the evidence, this court will not substitute its judgment for that of the trier of fact unless "the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found

guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). While this court's review of a sufficiency of the evidence claim is narrow, it must be meaningful. A jury cannot base its findings on conjecture and speculation. Reasonable inferences must be supported by facts in the record. ***State ex rel. Kanieski v. Gagnon***, 54 Wis. 2d 108, 117, 194 N.W.2d 808 (1972).

A review of the evidence in this case demonstrates that the state's case was so lacking in probative value and force that no jury, acting reasonably, could have found Siekierzynski guilty of disorderly conduct beyond a reasonable doubt.

It is important to note at the outset that the state chose to charge Siekierzynski with disorderly conduct, and not battery or false imprisonment. As such, the question before the jury was whether Sierkierzynski's conduct was disorderly within the meaning of Wis. Stat. § 947.01.

Wisconsin Statute § 947.01(1) (2013-2014) states as follows:

> 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.

Within these alternative means of committing disorderly conduct, the state limited the charge to allege that Siekierzynski's conduct was abusive or otherwise disorderly, and that is how the jury was instructed. (22:162). As such, in order to convict Siekierzynski of disorderly conduct, the state had to prove his conduct was abusive or otherwise disorderly,

and that his conduct occurred under circumstances that such conduct tended to cause or provoke a disturbance. *See* ***State v. Douglas D.,*** 2001 WI 47, ¶ 15, 243 Wis. 2d 204, 626 N.W.2d 725.

Disorderly conduct cases are fact-specific. "An objective analysis of the conduct and circumstances of each particular case must be undertaken because what may constitute disorderly conduct under some circumstances may not under others." ***State v. Schwebke***, 2002 WI 55, 253 Wis. 2d 1, 644 N.W.2d 666. "An examination of the circumstances in which the conduct occurred must take place, considering such factors as the location of the conduct, the parties involved, and the manner of the conduct." ***Id.*** at ¶ 30.

A. Siekierzynski's conduct was not abusive.

Because the state chose to allege that Siekierzynski's conduct was "abusive" or "otherwise disorderly," it is necessary to examine those terms. ***Id.*** at ¶ 26. In ***Douglas D.***, the court said that speech can be abusive because it carries with it the "non-speech element of an express or implied threat or challenge to fight." ***Douglas D.***, 243 Wis. 2d at 225, ¶ 24. Here, the state did not present any evidence that Siekierzynski's speech was abusive. While he and A.B. argued, his calling her a "creature" and saying "who are you" cannot be called abusive speech.

The next question is whether his blocking her way and grabbing of her forearm was abusive conduct. Wisconsin Statute § 813.12(1)(am) defines "domestic abuse" in the context of restraining orders and injunctions. Domestic abuse under that statute is the intentional infliction of physical pain, illness or injury; intentional impairment of a physical condition; sexual assault; stalking; criminal damage to property or the threat to engage in any of these. None of

these is applicable in this case with the possible exception of the infliction of pain when Siekierzynski was said to have grabbed A.B.'s arm. However, the state presented no evidence to prove that Siekierzynski grabbed A.B.'s arm with the intent of causing her physical pain. Without evidence of intent, his conduct was not abusive.

B. Siekierzynski's conduct was not otherwise disorderly.

The state also alleged Siekierzynski's conduct was "otherwise disorderly." In ***Schwebke***, the court noted it had previously defined "otherwise disorderly" as to "mean conduct of a type not previously enumerated but similar thereto in having a tendency to disrupt good order and to provoke a disturbance." ***Schwebke***, 253 Wis. 2d at 18, ¶ 25, (cites omitted). The question in ***Schwebke*** was whether the defendant's conduct was of the type that tended to disrupt "good order" or provoke a disturbance. Schwebke argued that his conduct—harassing individuals by mail--did not because his conduct was private and not public***. Id.*** at ¶ 25.

The court rejected Schwebke's attempt to limit disorderly conduct to conduct which would cause a public disturbance. However, the court still imposed some limits on the idea that purely private conduct could constitute a threat to "good order" or provoke a disturbance. The court held that private conduct could constitute a threat to "good order," but only if the conduct was likely to spill over into the community:

> [T]he disorderly conduct statute requires, at a minimum, that, when the conduct tends to cause or provoke a disturbance that is private or personal in nature, there must exist the real possibility that this disturbance will

> spill over and cause a threat to the surrounding community as well.

Id. at ¶ 31. The court explained that when conduct is of a type that affects the "overall safety and order in the community," the state has an interest in regulating that conduct.

Siekierzynski's conduct in the argument with A.B. did not present a "real possibility that this disturbance [would] spill over and cause a threat to the surrounding community." The argument between Siekierzynski and A.B. was a private argument that was not loud, profane or disruptive to others. Arguing during a visitation over breastfeeding and who would change the child's diaper, marked by Siekierzynski crying over the unfairness of the visitation agreement and A.B.'s comment that she did not "feel safe," sounds more like a fairly ordinary, if unpleasant, argument between two recently divorced people than a "disturbance" that would "spill over and cause a threat to the surrounding community."

C. Siekierzynski's conduct did not tend to cause or provoke a disturbance.

If the court concludes, however, that the jury could reasonably find that Siekierzynski's conduct was either abusive or otherwise disorderly, the next question is whether the state presented sufficient evidence to prove the conduct would "tend[] to cause or provoke a disturbance." In order to be disorderly, the person's conduct must consist of one of the six enumerated statutory factors *and* the conduct must tend to cause or provoke a disturbance. ***State v. Zwicker***, 41 Wis. 2d 497, 515, 164 N.W.2d 512 (1969). (emphasis in original).

The court in ***Douglas D.*** discussed whether a student's writing assignment which threatened his teacher tended to

cause or provoke a disturbance, even though the writing assignment went only to the teacher. The court concluded the child's story did tend to cause or provoke a disturbance in light of the growing prevalence of violence in schools**.** ***Douglas D.***, 243 Wis. 2d at 227, ¶ 28. Citing literature on school violence, the court observed that such violence makes teaching difficult and thereby inhibits student learning. ***Id.*** at 227-28, ¶ 28.

No equivalent spillover effect exists in this case. Certainly domestic violence is of concern to the state. But there is a line between an argument and domestic abuse. In ***Zwicker***, the court said that the "design of the disorderly conduct statute is to proscribe substantial intrusions which offend the normal sensibilities of average persons or which constitute significantly abusive or disturbing demeanor in the eyes of reasonable persons." ***Zwicker***, 41 Wis. 2d at 508. No argument is pleasant, but arguments are part of ordinary living, and are likely routine between an ex-wife and ex-husband who must work out visitation arrangements. A.B., who was then 30-years-old and held a bachelor's degree in fine arts, testified that the worst thing Siekierzynski called her during this argument was "a creature." (22:115, 117; App. 123; 125). She said their divorce was not amicable, and they had been divorced only two months before this argument occurred. (22:94-96; App. 102-104). A.B. knew that Siekierzynski wanted to have more visits with their son. (22:110; App. 118).

A.B. also testified that Siekierzynski did not swear at her, did not threaten to hurt her or their child, and acknowledged she knew Siekierzynski was crying because he was upset she was going to take their child away from him. (22:113; App. 121). He told her she could leave, but did not want her to leave with the child. (22:114; App. 122). He did

not run after her when she left with their child, or scream after her. (22:114; App. 122).

In sum, the state did not present sufficient evidence for the jury to conclude that Siekierzynski's conduct fell within the contemplation of the disorderly conduct statute. His words and actions were not abusive or otherwise disorderly, and did not pose a risk of spilling over to disrupt the "peace, order or safety of the surrounding community." ***Schwebke***, 253 Wis. 2d at 22, ¶ 30. "Conduct is not punishable under the statute when it tends to cause only personal annoyance to a person." ***Id.*** Here, A.B. was upset by the argument, but there was no risk to the peace, order or safety of the surrounding community. Accordingly, the jury's verdict is not supported by the evidence.

CONCLUSION

For these reasons, Kerry A. Siekierzynski respectfully requests that the court vacate his conviction for disorderly conduct because it is not supported by sufficient evidence.

Dated this 11th day of January, 2016.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 2,211 words.

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I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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 11th day of January, 2016.

Signed:

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