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OF WISCONSIN**

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Case No. 2015AP002350-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

Kerry A. Siekierzynski,

Defendant-Appellant.

ON APPEAL FROM JUDGMENT OF CONVICTION ENTERED IN CIRCUIT
COURT BRANCH VI FOR OUTAGAMIE COUNTY

The Honorable Vincent R. Biskupic, Presiding

BRIEF & APPENDIX OF PLAINTIFF-RESPONDENT

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02/09/2016

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QUESTIONS PRESENTED

Was the evidence presented at trial sufficient for a reasonable jury to convict Siekierzynski of Disorderly Conduct?

POSITION ON ORAL ARGUMENT AND PUBLICATION

Siekierzynski was convicted of a misdemeanor, therefore this appeal will be decided by a single judge. See Wis. Stat. §752.31(2) and (3) The Court's opinion will not be published. Oral argument is not requested by the state.

STATEMENT OF THE CASE

Siekierzynski's Statement of the Case is accurate so far as it goes, and need only be supplemented with additional information where relevant to argument.

STANDARD OF REVIEW

In reviewing the evidence to discern its sufficiency to sustain a conviction, the Court will not substitute its judgement for that of the jury 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). Further, "once the jury has been properly instructed on the principles it must apply to find Siekierzynski guilty beyond a reasonable doubt, a court must assume on appeal that the jury has abided by those instructions." *Id.* at 507.

ARGUMENT

At trial, the jury was presented with sufficient evidence to find that Siekierzynski committed "disorderly conduct" by means of abusive or "otherwise disorderly conduct that, under the circumstances then existing, tended to cause or provoke a disturbance, contrary to Wisconsin Statutes §947.01.

A. Siekierzynski's conduct was abusive.

Siekierzynski presents the proposition from **Douglas D.** that speech can be abusive because it carries a "non-speech element of an express or implied threat or challenge to fight." *In re Douglas D.*, 2001 WI 48 at ¶24, 243 Wis. 2d 204, 626 N.W.2d 725. The evidence before the jury in this matter dealt not only with Siekierzynski's speech, but with Siekierzynski's physical actions toward his ex-wife, A.B. Siekierzynski's contention that his words cannot be called

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abusive ignores the non-speech elements of Siekierzynski's words.

Calling someone a "creature" and asking "who are you?" may not be abusive in all circumstances. The question is what constitutes disorderly conduct is not one answered in a vacuum, but one to be answered based upon an "objective analysis of the conduct and circumstances of each particular case," "because what constitutes disorderly conduct under some circumstances may not under others." **State v. Schwebke**, 2002 WI 55 at ¶24, 253 Wis. 2d 1, 644 N.W.2d 666.

Siekierzynski's abusive speech came in the context of a dispute between two parents over the rearing of their child. (R.97,98/R.App. 105-106). It came in the context of a less than amicable divorce which remained fresh. It occurred during Siekierzynski's visitation with the child which was court ordered to be supervised. A.B. testified that their relationship was tense and that the visit in question was also tense to begin with. The language was accompanied by the physical acts of Siekierzynski grabbing A.B.'s arm and pushing her or it. It was further accompanied by Siekierzynski repeatedly physically blocking A.B.'s attempt to leave the residence when she began to feel threatened or unsafe (R. 105, 107 / R.App 113, 115). Siekierzynski told A.B., that she could leave but that their child had to stay, a possibility which both parties would have known to be contrary to the ordered visitation. (R. at 95:3-4 / R.App. 103). (R. 105:14-18 / R App. 113).

It is in the context of the unfriendly relationship, an emotionally charged situation and the physical impediments to A.B.'s liberty that Siekierzynski's language must be construed. As such, a reasonable jury could very well find "an express or implied threat or challenge to fight," with A.B.

B. Siekierzynski's conduct was otherwise disorderly.

Siekierzynski correctly points out that "otherwise disorderly" is intended to include conduct not enumerated by similar in nature to other enumerate forms of disorderly conduct in its tendency to cause or provoke a disturbance. **Schwebke**, 2002 WI 55 at ¶25. However, he incorrectly

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applies that standard to the facts of the case. As with the evaluation of the abusiveness of Siekierzynski's conduct, the Court must consider the conduct in light of the circumstances that surround it. The words and deeds, taken together if not taken separately, constitute "otherwise disorderly" conduct.

Taken in the context of the family's situation, the visitation situation set up by a family court, the and the verbal dispute that was ongoing, the jury's conclusion that Siekierzynski's physical restraint of A.B. constituted conduct that had a "tendency to disrupt good order and to provoke a disturbance" was a reasonable one.

Siekierzynski's conduct as testified to by A.B. and as he recounted to Officer Gray, bares a strong resemblance to the conduct prohibited by Wisconsin Statutes §940.30 (2013-2014), which states:

"(w)hoever intentionally confines or restrains another without the person's consent and with knowledge that he or she has no lawful authority to do so is guilty of a Class H felony."

The fact that Siekierzynski's conduct in this matter closely resembles the conduct prohibited by that statute should be taken as a recognition by the Wisconsin Legislature that this type of conduct has a tendency to be disruptive to "good order." That Siekierzynski prevented A.B. from leaving, thus confining or restraining her is scarcely contested. A.B.'s lack of consent is also evident from her repeated attempts to seek alternate exits. Siekierzynski acknowledged to Officer Gray that his visitation with his child was supposed to be supervised, is strongly suggestive of his knowledge that he lacked the authority to restrict A.B.'s ability to leave.

The state has discretion in its prosecutorial power and a mandate to utilize that power for the administration of justice rather than obtaining convictions. **State v. Karpinski**, 92 Wis.2d 599, 285 N.W.2d 729 (1979). It stands to reason that the administration of justice is also higher priority than obtaining what might be seen as a more "severe" conviction, even though it may be applicable. The

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fact Siekierzynski was not charged under the most severe criminal statute for which his behavior qualified does not undermine the tendency that such conduct has to disrupt "good order."

Further consideration of whether Siekierzynski's conduct constituted "otherwise disorderly" conduct is strongly intertwined with the consideration of whether it had a tendency to cause or provoke a disturbance. Discussion of its tendency to cause or provoke a disturbance is properly considered when considering whether the behavior constitutes "otherwise disorderly" as well.

- C. Siekierzynski's conduct did tend to cause or provoke a disturbance.

In *Schwebke*, the Court recognized that:

"...in domestic disputes, even though the disturbance may only occur on a private level, such conduct affects the overall safety and order in the community, and the state has an interest in regulating this conduct as well."

Schwebke, 2002 WI 55 at ¶31. In *Schwebke*, the Court also noted concern by the friends and family of the victims of this Schwebke's conduct as evidence that private mailings were disruptive to the community. *Id.* at ¶32. Unlike in *Schwebke*, this case does not involve obsessive behavior to A.B.; it does however involve physical action against A.B. that first caused her pain, and then repeatedly physically restricted her freedom of movement. The inference that A.B.'s family would have been similarly concerned after hearing about what had occurred during this visit is not only reasonable, it is strong on its face and bolstered by the fact that A.B.'s parents had assumed the role of supervising the visitation subsequent to the events that are the subject of this case. (R.95:19-24 / R.App. 103).

Present during this dispute was the infant child shared by Siekierzynski and A.B.. The child was not only present, but in close proximity to Siekierzynski and A.B., often being held by one of them during the argument. (R. 97-110 / R.App. 105-118). The child was not a party to the

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dispute. He was merely its subject and an innocent individual trapped in the situation by his inability to speak for himself, leave on his own, or even to leave with his mother, A.B., until Siekierzynski let his guard down and A.B. was able to remove them from the situation. This disturbance is more than a private one between its participants.

Public order was also implicated during this disturbance by the fact that the family court was involved in setting up the custody, placement and visitation arrangement that was a significant contributing factor to the disturbance. Given the existence of conditions placed upon Siekierzynski's visitation rights, that his actions would necessitate judicial and / or law enforcement intervention is an eminently rational inference to be drawn from the facts.

The argument that this matter was private and did not have the potential to spill over into the community is directly contradicted by the actions of not only A.B. immediately following the incident, but by Siekierzynski's actions at the tail end of the disturbance as well. A.B. testified that once she left the residence, when she got to what she believed to be a safe distance, she phoned the police. (R. 108-109 / R.App. 116-117). She further testified that Siekierzynski told her that he was going to call "CPS or the authorities" about her denying him visitation on that day. (R. 107 / R.App. 115).

The evidence suggests that not only did A.B. believe that the situation necessitated outside intervention, but that Siekierzynski also believed the situation necessitated outside intervention. Where both parties to a dispute call on outside intervention for assistance, it can hardly be said that there is not risk of the dispute spilling over into the surrounding community because it has. This alone may be enough to support the Jury's finding that Siekierzynski's actions tended to cause or provoke a disturbance sufficiently to sustain the verdict against Siekierzynski's appeal. The additional public implications of their child's involvement, likely concern of A.B.'s family, as well as the implications involving the Courts as pertaining to the custody and placement order buttress the Jury's finding.

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Having heard the evidence, being instructed on the law, and hearing what are essentially the same arguments presented on appeal, the Jury found not that Siekierzynski was involved in a normal family argument between ex-spouses, but "guilty" of Disorderly Conduct. That finding is supported by the evidence and the rational inferences to be drawn from that evidence. In light of the mandate of **Poellinger** that the evidence be viewed in the light most favorable to the state and the conviction, and that a jury properly instructed on the law is presumed to follow those instructions, Siekierzynski's requested relief is tantamount to asking the Court to substitute its judgement for that of the trier of fact.

CONCLUSION

Based upon the foregoing, the State of Wisconsin respectfully asks that the Court deny Siekierzynski's appeal and uphold his conviction for disorderly conduct.

Respectfully submitted this 10th day of February, 2016.

By: _____
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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief and appendix produced with a monospaced font. The length of this brief is 7 pages.

Dated: February 10, 2016

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CERTIFICATION OF THIRD-PARTY COMMERCIAL DELIVERY

I certify that on February 10, 2016, this brief or appendix was delivered to a third-party commercial carrier for delivery to the Clerk of the Court of Appeals within 3 calendar days. I further certify that the brief or appendix was correctly addressed.

Date: February 10, 2016

Signature: _____

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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 10th day of February, 2016.

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