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 the Outagamie County Circuit Court,
The Honorable Vincent Biskupic, Presiding

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

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

A. Siekierzynski's conduct was not abusive.

According to the state, "Siekierzynski's contention that his words cannot be called abusive ignores the non-speech elements of Siekierzynski's words." (State's brief at 2-3). Mr. Siekierzyski agrees that the circumstances in which the words were spoken are a proper consideration. But just because the words were said during an argument between two parents who were recently divorced and attempting to navigate visitation arrangements of their young son does not render innocuous words abusive.

The supreme court has instructed that "'abusive' speech carries with it the nonspeech element of an express or implied threat or challenge to fight." ***State v. Douglas D.***, 2001 WI 47, ¶24, 243 Wis. 2d 204, 626 N.W.2d 725. A.B. testified that the "worst thing" Mr. Siekierzynski called her during the argument was "a creature". (22:115). He also asked, "who are you?" (22:102). Mr. Siekierzynski used no profanity, nor did he say he was going to harm her or their child. (22:113). Even when spoken during a "tense" visitation (State's brief at 3), the words uttered by Mr. Siekierzysnki cannot reasonably be deemed abusive. *Contrast* ***Lane v. Collins***, 29 Wis. 2d 66, 72, 138 N.W.2d 264 (1965) (calling another person a "son-of-a-bitch" under charged circumstances may constitute abusive language).

The state notes that the "language was accompanied by the physical acts of Siekierzynski grabbing A.B.'s arm and pushing her or it." (State's brief at 3). That physical contact

apparently occurred as the two bickered about who would change the baby's diaper. (22:98). Significantly, A.B. testified that there was no yelling and no one even raised their voice when that brief physical contact occurred. (22:99). Mr. Siekierzynski's innocuous words, even accompanied with the brief touching of A.B.'s arm, do not amount to abusive conduct.

B. Siekierzynski's conduct was not otherwise disorderly.

In response to Mr. Siekierzynski's argument that the evidence did not prove his conduct was "otherwise disorderly" within the meaning of Wis. Stat. § 947.01(1), the state relies primarily on evidence that he stood by the front and back doors temporarily blocking A.B.'s exit. (State's brief at 4-5). In particular, the state argues that it could have charged Mr. Siekierzynski with false imprisonment in violation of Wis. Stat. § 940.30, which, according to the state, shows that his conduct was disruptive to good order. (*Id.*). Mr. Siekierzynski's response is two-fold.

First, even if the state could have proven false imprisonment, that does not mean the state presented sufficient evidence to prove disorderly conduct, the offense it chose to charge. Disorderly conduct is not a lesser included offense of false imprisonment. The two crimes have different elements. Particularly important for purposes of this case is that disorderly conduct has a public element absent from the crime of false imprisonment. The supreme court has held that conduct may constitute otherwise disorderly conduct punishable under § 947.01 if there is a "real possibility" that the disturbance "will spill over and cause a threat to the surrounding community as well." ***State v. Schwebke***, 2002 WI 55, ¶31, 253 Wis. 2d 1, 644 N.W.2d 666. False

imprisonment has no such public component but, rather, punishes the nonconsensual and intentional confinement of another person. ***State v. Burroughs***, 2002 WI App 18, ¶19, 250 Wis. 2d 180, 640 N.W.2d 190.

Second, the evidence here was insufficient to prove a real possibility that the disturbance would spill over and cause a threat to the surrounding community. Surely, the fact that A.B. decided to call the police does not dictate whether conduct is deemed disorderly. Otherwise, any such call to police would necessitate not only an arrest but seemingly a conviction for disorderly conduct. Moreover, what the police found when responding to her call belies any claim that the safety of the community was at risk. After all, when the officer spoke with A.B. shortly after she had left Mr. Siekierzynski, she was calm and thoughtful. (22:133, 135). The officer found Siekierzynski sitting outside his sister's house, crying. (22:125-26). He was not aggressive with the officer; rather, he was sad and cooperative. (22:130).

The evidence showed the argument was a private argument between two adults that posed no real possibility of spilling over and causing a threat to the surrounding community.

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

Even if the state proved abusive or otherwise disorderly conduct, which Mr. Siekierzynski disputes, the conviction cannot stand because the state failed to prove the second element, which is that the conduct tended to cause or provoke a disturbance.

The state tries to make much of the fact that the argument occurred in the context of a court-ordered visitation. But there is hardly anything remarkable about disputes between divorced parents over matters of custody and visitation. Indeed, the police officer testified that he is dispatched to calls involving custody disputes "once or twice a month on average." (22:127). Arguments between divorced parents about visitation are, in his experience, "pretty common". (22:131). Those calls do not always result in an arrest. (22:127). Sadly, such arguments are not unusual. And given their frequency and private nature, many of those arguments will not tend to cause or provoke a disturbance.

Specifically, here, A.B. acknowledged that the child was unhurt, and Siekierzynski never threatened to harm either she or their son. (22:104, 113, 115). A.B.'s testimony that Siekierzynski "got on his cell phone and said he was going to call CPS …" adds little, given that doing so was a reasonable and law-abiding response to A.B.'s unilateral decision to end the visit. (22:107).

No doubt A.B. was unnerved by the argument. But the statute does not punish conduct "which might possibly offend some hypercritical individual." ***State v. Zwicker***, 41 Wis. 2d 497, 508, 164 N.W.2d 512 (1969). Here, there was no risk to the peace, order and safety of the surrounding community. The state failed to prove that Mr. Siekierzynski engaged in conduct tending to cause or provoke a disturbance.

CONCLUSION

For the reasons set forth above and in his brief-in-chief, Kerry A. Siekierzynski respectfully requests that the court vacate his conviction for disorderly conduct because it was not supported by sufficient evidence.

Dated this 25th day of February, 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 1,036 words.

CERTIFICATE OF COMPLIANCE WITH 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 § 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 25th day of February, 2016.

Signed:

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