STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appeal No: 2016-AP-1484 CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

WILLIAM A. WISTH,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION
AND ORDER DENYING POSTCONVICTION
RELIEF, ENTERED IN THE
OZAUKEE COUNTY CIRCUIT COURT,
THE HONORABLE TODD K. MARTENS, PRESIDING

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

Trisha Stewart Martin
State Bar No. 1016571

Stewart Law Offices
P.O. Box 18243
Milwaukee, WI 53218
(414) 933-0067

Attorney for Defendant-Appellant

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ISSUES PRESENTED

1. Whether the contempt of court conviction violates Mr. Wisth's constitutional right to free speech?

Trial Court: Not answered/No.

2. Whether there is insufficient evidence to support the conviction for contempt of court?

Trial Court: No.

3. Whether the jury instruction on contempt of court was erroneous?

Trial Court: No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Defendant-Appellant does not request oral argument or publication.

STATEMENT OF THE CASE AND FACTS

In a prior case, no. 2012CM647, Wisth was being tried, for resisting a peace officer and disorderly conduct. (1:1). He was representing himself. (1:1). On July 29, 2014, he attempted, improperly, to serve documents in order to have two witnesses appear at his trial the next day but this only resulted in new charges against him – case no. 14CF233. (95:4,20:21). Judge Malloy had denied his requests for an adjournment of the trial amongst other things. (99:166-67.) He also denied his requests for a lawyer. (99:167; 109:7).

Feeling frustrated with the system, and unhappy with Judge Malloy, he decided to exercise his First Amendment rights in protest. (99:165,169). Therefore, the next day, he went to the courthouse for his second day of trial with about 500 flyers he had printed at Kinkos and a cardboard sign. (99:138). After clearing it with the sheriff's office, he

commenced his protest. (99:139,157). He sat on a bench outside the front entrance, (which was visible to the courthouse security station), with his sign and flyers, intending to hand out flyers to passersby. (99:150).

The flyers read:

> "Beware, Beware. Do not trust Ozaukee County or Judge Malloy! If you are a criminal defendant: your rights will be taken away from you. 1. Do not request an attorney. 2. The judge will work in the DA's favor. 3. The Judge will work in the favor of the police. 4. You cannot plead guilty and get a fair jury trial in Ozaukee County. The Judge should not be a Judge. Do not trust Judge Malloy or the Ozaukee County Sheriffs Department."

(1:2; A-Ap. 103). The cardboard sign read:"Don't trust Judge Malloy or Ozaukee County Sheriff's Department! They are dishonest." (1:2; A-Ap. 103).

The very first passerby was a female who ignored him. (99:145). When a deputy came out a few minutes later, he accepted a flyer. (99:146). Thereafter, deputies came out, took away his flyers and sign and escorted him to Judge Malloy. (99:170). It so happened that the female passerby who ignored him was a juror. (99:146).

Judge Malloy questioned the juror and Mr. Wisth on the record. (99:171,179). Mr. Wisth stated his intent was to exercise his First Amendment rights, that he had first cleared his intent to protest outside the courthouse with the sheriff's office and that he did not know the female was a juror. (99:172). The colloquy between the juror and the judge showed she did not read the sign or take a flyer and was not influenced by anything Mr. Wisth presented. (109:14-15). Thereafter, the trial proceeded and concluded that day. (99:147).

On August 7, 2014, the instant action was filed, charging Mr. Wisth with Count 1 Communicating with Jurors and Count 2 Contempt of Court - Disobey Order. (1:1).

Judge Malloy recused himself. The case was reassigned to the Judge Todd K. Martens. (9). The case proceeded to trial. The jury instruction, Wis JI-Criminal 2031 was modified, removing all reference to an order and adding all of the statutory terms in the disjunctive, as they appear in the contempt statute. (38; 99:193). The jury returned a verdict of acquittal on count 1 and a guilty for "contempt of court, as charged in the information"on count 2. (41; 99:243). Thereafter, he was sentenced on August 18, 2015, to 60 days in the Ozaukee County Jail with Huber together for "contempt of court, as charged in count two."(109:16).

In sentencing him, the trial court noted from Judge Malloy's transcript that the juror was not influenced and the trial was not affected but observed that "this was a case that in many, many, circumstances would never habe been charged. There would be other ways to deal with it." (109:14). It noted that free speech was subject to reasonable restrictions "and a reasonable restriction here was placed on the defendant by the Judge, which is not to have any contact with the jurors. I'm not sure what the motivations are for Mr. Wisth's apparently pointless challenges to authority, maybe he just likes to poke the bear. I don't know." (109:15). A Judgement of Conviction was entered on August 19, 2015 describing the offense as "Contempt of Court/Disobey Order". (48).

In response to Mr. Wisth's postconviction motion, (67), filed on or about April 28, 2016, the trial court ordered a response brief from the State and set a hearing date at which the defendant was to submit an oral reply, if any. The State filed a response brief. (69). A motion hearing proceeded on July 1, 2016 where, following an oral reply, the postconviction motion was denied. (101:3-6; 101:6-13, A-Ap. 102). Defendant-appellant appeals.

I THE CONVICTION MUST BE REVERSED BECAUSE THE CARDBOARD SIGN AND FLYERS DID NOT CONSTITUTE CONTEMPT AND FELL WITHIN THE PROTECTION OF THE CONSTITUTIONAL RIGHTS TO FREE SPEECH.

Whether speech is protected is a question of law, reviewed de novo. See, Lounge Mgmt., Ltd. v. Town of Trenton, 219 Wis. 2d 13, 19-20, 580 N.W.2d 156 (1998). Interpretation and application of statutes in determining whether the sign and flyer constitute contempt under the statute, presents a question of law which is also reviewed de novo. Christensen v. Sullivan, 2009 WI 87, ¶ 42, 320 Wis. 2d 76, 768 N.W.2d 798.

Under the First Amendment of the United States Constitution and Art. I, sec. 3 of the Wisconsin Constitution all citizens have a right to free speech. Art. I, sec. 3 provides:

> Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right, and no laws shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions or indictments for libel, the truth may be given in evidence, and if it shall appear to the jury that the matter charged as libelous be true, and was published with good motives and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact.

It has been long established that by virtue of the first and second clauses of Art I, sec. 3, there is a right to free speech as to which the state may not interfere. Jacobs v. Major, 139 Wis. 2d 492, 504-505, 407 N.W.2d 832 (1987). "[I]t is state action that is restrained from interfering with the right to speech." Id.

The U.S. Constitution created a national government of limited and enumerated powers. Jacobs, supra at 506. Thus, all of its powers are only those which have been delegated to it. Id. at 506. By contrast, a state constitution typically creates a state government with general powers and

establishes a Declaration of Rights whereby the powers possessed by the state are only those powers not denied/restrained by the Declaration of Rights. Id., at 507. Therefore, the state legislature may only "legislate laws not forbidden by the state constitution." Id.

A The Cardboard Sign and Flyers are protected speech under United States and Wisconsin constitutions

Here, Mr. Wisth was charged with contempt of court after he set forth his sentiments about a judge, the Ozaukee Sheriff Department and Ozaukee County on a cardboard sign and on flyers and displayed them outside the courthouse. (1:2; A-Ap. 103).

In State ex rel. Attorney Genl. v. Circuit Court of Eau Claire City, 97 Wis. 1, 72 N.W. 193, (1897), a lawyer and newspaper editor were convicted of criminal contempt of court after they published, circulated and distributed newspaper articles accusing a sitting judge, who was up for re-election, of bias and corruption in past trials. The articles which were several columns in length, charged the judge with "being extravagant in the management of the court, and with being partial and unfair in respect to his official conduct in the trial of causes, and with being influenced by corrupt motives." Id. at 193. None of the cases referred to in the article were then pending or on trial. Id.

The criminal charge against them alleged that the judge had a case actively in trial with a panel of jurors, that the articles were distributed to residents of the state and read by officers of the court and members of the jury. Eau Claire Cnty., 72 N.W. at 195. It was of particular note that the content of the articles did not refer to a pending case or trial but rather, the judge's general character and his acts in past cases. Id. Also, the publications did not refer to pending litigation nor were they circulated in the presence of the court. Id.

A common law definition of criminal contempt was

"any act which tends either to obstruct the course of justice or to prejudice the trial in any action or proceeding then pending in court." Id. at 194. It has always been recognized that courts possess inherent power to punish such acts. Id. (citations omitted). Although this inherent power, resembling despotic power, "may be regulated, and the manner of its exercise prescribed, by statute, but certainly it cannot be entirely taken away, nor can its efficiency be so impaired or abridged as to leave the court without power to compel the due respect and obedience which is essential to preserve its character as a judicial tribunal." Id. (citations omitted.). It is a power arising from and based upon necessity. Id. at 195. However, "due regard for the liberty of the citizen imperatively requires that its limits be carefully guarded so that they be not overstepped." Id. Since it is a power of necessity, "it must be measured and limited by the necessity which calls it into existence." Id.

The court was allegedly in session with a jury trial when the articles were circulated in the city of Eau Claire, were distributed to various residents in this state, were distributed and delivered to officers "'of said court, and to persons summoned as jurors in said court,' and 'were read by the officers and jurors so in attendance in said court.'" Id., at 195. The court noted, the content of the articles did not refer to cases pending or on trial, but rather, "contained only strictures upon the general character of the judge, and his acts in former cases." Id., at 195. There was no allegation that the articles were circulated in the immediate presence of the court. Id.

A review of case law across jurisdictions showed that the majority of cases found criminal contempt if the publication actually referred to an action or proceeding which was then pending and undecided. Id. at 195 (citations omitted.). Where, however, the publication pertained to actions past and ended, the opinions were marked by contrariness and confusion. Id. at 195. Some found contempt, reasoning that the publications "tend to diminish the respect due to the court in the trial of future causes and thus impair its usefulness." Id. at 195. Some found such publications did not

constitute contempt. Id. Some found that even if the publication was punishable as a constructive contempt at common law, that the legislature had properly limited the power by statute. Id. Then there were still other cases holding such publications did not constitute contempt under our form of government and that punishment "would be a serious invasion of the great constitutional guaranties of freedom of speech and of the press." Id.(citations omitted.).

Only a single unpublished case could be found in this state. Id. In that case the defendants published an article accusing a grand jury and presiding judge of corruption and malice in regard to an indictment against school land commissioners. They were found in contempt and fined. The judgment was reversed upon a holding that the publication did not constitute contempt. Id., at 196.

Although the weight of the case, being that it was unpublished case, was open to debate, the court agreed with its holding that newspaper comments on cases finally decided prior to the publication cannot constitute criminal contempt. Id. It reasoned that:

> "Important as it is that courts should perform their grave public duties unimpeded and unprejudiced by illegitimate influences, there are other rights guarantied to all citizens by our constitution and form of government, either expressly or impliedly, which are fully as important, and which must be guarded with an equally jealous care. These rights are the right of free speech and of free publication of the citizen's sentiments 'on all subjects.'"

Id.

Further, it continued, as regards the publications, the use of such power was not a necessity. The subject of the publications was a judge who was up for re-election and the claim was that because he was a judge and was holding court at the time of the "unfavorable criticism" there should be punishment for contempt. Id., at 196. Followed to its conclusion, the court noted, the result would be that:

> "all unfavorable criticism of a sitting judge's past official

> action can be at once stopped by the judge himself, or, if not stopped, can be punished by immediate imprisonment. If there can be any more effectual way to gag the press, and subvert freedom of speech, we do not know where to find it.

"

Id. at 196. Thus, as to the necessity of such a power as against the constitutionally guaranteed rights of the citizen to publish opinions concerning even a judge, the court concluded "no such power as this is necessary for the due administration of justice." Id. Any common law to the contrary has never, the court noted, been adopted. Id. Furthermore, "so extreme a power is inconsistent with and would materially impair, the constitutional rights of free speech and free press." Id.

In addition, the court found the charge to be barred under the statute. The criminal contempt statute under which the charge was brought, defined criminal contempts and divided them into seven classes. Id. Only two of the classes were possibly pertinent, namely: "'(1) Disorderly, contemptuous, or insolent behavior committed during its sittings, in its immediate view and presence, and directly tending to interrupt its proceedings, or to impair the respect due its authority.'" "'(6) The publication of a false or grossly inaccurate report or copy of its proceedings; but no court can punish as a contempt the publication of true, full, and fair reports of any trial, argument, proceedings or decisions had in such court.'" Id.

The court found the publication was not subject to the first section since that section required the punishable act to have occurred in the court's presence and there had been no such allegation. Id. There was not even an allegation "that the publication had been circulated in the court room." Id. Subparagraph 6 did not apply either because to the extent the publication itself could be considered a report, still there was no allegation that it was false or grossly inaccurate. Id. Thus, the court concluded no contempt was stated and, therefore, punishment for contempt exceeded the court's jurisdiction. Id.

Here, although there are assertions against the sheriff's department and the county as well, it is only the speech pertaining to the judge which the State seeks to punish. According to the State, in closing argument, it is the "words" in Mr. Wisth's sign and flyer which show "disrespect to the authority of the judge" (99:212). These "words with their clear intent, their clear meaning, there is no other way to construe it." Id.

It is undisputed in the record, however, that the signs were not displayed in the judge's presence or distributed in the courtroom. Mr. Wisth was exercising his First Amendment rights in protest of perceived unfairness and feelings of frustration in regard to the judge, the sheriffs and the county. (99:172). The one juror who passed his display outside the courthouse did not take a flyer and did not read the sign. (99:101,102). It did not affect the juror or the trial. (109:14-15). Nothing in the proclamations makes reference to Mr. Wisth's pending trial or any court case. There was no constructive contempt here.

The articles in Eau Claire Cnty., 72 N.W. at 193, spanned several newspaper columns and contained assertions pertaining to the judge's extravagant management of his court, partiality in trials, unfairness in trials, being influenced by corrupt motives. Officers of the court and sitting jurors read the articles. In reviewing the case, the Supreme Court found it significant that the article was not distributed in the court's presence and did not reference a case actually pending. It found that the article did not constitute a constructive contempt of court because although it is important that courts be able to perform their duties without prejudicial or illegitimate impediments, the constitutional right of a citizen to express "sentiments 'on all subjects'" was to be "guarded with an equally jealous care." Id. at 196. Furthermore, the court found, use of the contempt power to punish critical or unfavorable speech made outside the court's presence subverts the freedom of speech and was not "necessary for the due administration of justice." Id. at 196.

Under the Wisconsin and United States constitutions

as well as the holding in Eau Claire Cnty., the content of the cardboard sign and flyers was protected speech and cannot constitute a constructive criminal contempt. Freedom of speech "on all subjects" is a constitutional right, entitled to protection equal to that accorded the courts' contempt power. Eau Claire Cnty., supra. Also see, Craig v. Harney, 331 U.S. 367, 376 (1947)("a judge may not hold in contempt one who 'ventures to publish anything that tends to make him unpopular or to belittle him....'")(citation omitted.). Further, "injury to the reputation of judges or the institutional reputation of courts is not sufficient to justify 'repressing speech that would otherwise be free.'" Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 829 (1978)(citation omitted.). The contempt power simply is not necessary for the due administration of justice where the citizen's speech amounts to criticism of the judge outside the courtroom. Eau Claire Cnty., supra.. Clearly, Mr. Wisth's sign and flyer contained speech protected by the First Amendment and Art. 1, sec. 3 of the Wisconsin constitution. Therefore, the prosecution for contempt arising from the words in such speech was barred.

B The criminal complaint and information failed to state a contempt offense and therefore punishment for contempt was in excess of the court's jurisdiction.

In Wisconsin, the contempt power is subject to legislative regulation. "[W]henever a statute prescribes the procedure in a prosecution for contempt or limits the penalty, the statute controls." State ex rel. Laning v. Lonsdale, 48 Wis. 348, 367, 4 N.W. 390 (1880); also see, Douglas County v. Edwards, 137 Wis. 2d 65, 87-88, 403 N.W.2d 438 (1987).

Mr. Wisth was charged with contempt of court - disobey order in violation of Wis. Stats. s. 785.01(1)(b). Both the criminal complaint and information charged:

> "Count 2 Contempt of Court - Disobey Order
>
> The above-named defendant on or about Wednesday, July

> 30, 2014, in the City of Port Washington, Ozaukee County, Wisconsin, did intentionally disobey, resist, or obstruct the authority, process, or order of the court, contrary to sec. 785.01(1)(b), 785.04(2)(a) Wis. Stats., a Misdemeanor, and upon conviction may be fined not more than Five Thousand Dollars ($5,000), or imprisonment in the county jail for not more than one (1) year, or both."

(19:1; 1:1). It is alleged in the complaint that Mr. Wisth had been admitted to bail, in the underlying case, with a condition that he not commit any crimes. (1:1). Quoting the sign and flyer, as well as incorporating them as exhibits, the complaint alleges that Mr. Wisth attempted to give a flyer to a juror outside the courthouse. (1:2).

The charged statute provides:

> "785.01 Definitions. In this chapter:
> (1) "Contempt of court" means intentional:
>
> (a) Misconduct in the presence of the court which interferes with a court proceeding or with the administration of justice, or which impairs the respect due the court;
>
> (b) Disobedience, resistance or obstruction of the authority, process or order of a court;
>
> (bm) Violation of any provision of s. 767.117(1);
>
> (c) Refusal as a witness to appear, be sworn or answer a question; or
>
> (d) Refusal to produce a record, document or other object.

Subsection (1)(b) clearly sets forth several non-synonymous terms in the disjunctive. When the terms are viewed as offenses, there are at least three offenses: 1. disobedience of an order, 2. resistance of process, 3. obstruction of authority. Also, the plain language could be seen as providing for three types of contempt: contempt pertaining to the court's authority, contempt pertaining to process of the court and contempt pertaining to a court order. Then, considering this

and the remaining terms, any one of these 3 contempts may be established by an act in disobedience, or an act in resistance or an act in obstruction.

Instead of charging one of the offenses or one type of contempt, the complaint and information charge all of the terms of subsection (1)(b) as laid out in the statute in the disjunctive without supporting allegations. Thus, not only was the charge duplicitous and lacking required certainty and specificity, but, furthermore, no offense was stated at all. See, Champlain v. State, 83 Wis. 2d 751, 754, 193 N.W.2d 868 (1972)(no crime is charged where the complaint or information fails to charge one of the alternative elements and therefore the complaint or information is jurisdictionally defective and void.); Eau Claire Cnty., supra., at 196. Also see, State v. Kitzerow, 221 Wis. 436, 438-39, 267 N.W. 71 (1936)(where the terms are not synonymous, state may not charge in the disjunctive.).

On the one hand, 'disobey order' was not a basis for the contempt charge (99:229; 101:12, A-Ap. 102). On the other hand, it was since all of the statute's terms were charged, i.e., "the defendant on July 30, 2014 in the City of Port Washington, Ozaukee County Wisconsin, did intentionally disobey, resist or obstruct the authority, process or order of the court." (1:1; 19:1). Regardless, there are no allegations which identify or specify an intentional act by Mr. Wisth which fell into one of the contempt offenses in subsection (1)(b). Suffice it to say, the disjunctive charge fails to state an offense and, in any event, contains no allegation of an act by Mr. Wisth establishing a contempt offense under the statute. Thus, the court exceeded its jurisdiction when it punished him for contempt. See. Eau Claire Cnty, supra.

II AS A MATTER OF LAW, THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE CONVICTION FOR "CONTEMPT OF COURT - DISOBEY ORDER."

"An appellate court may not reverse a conviction unless the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." State v. Poellinger, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). "[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 597 U.S. 358 (1970).

Mr. Wisth was charged with contempt of court - disobey order. It is beyond dispute that no evidence was presented of an order or disobedience of an order. When defense counsel pointed to this omission in closing argument (99:223), the prosecutor, in rebuttal, asserted he was not required to prove an order. (99:229). The Judgment of Conviction reflects Mr. Wisth was convicted of Contempt of Court - Disobey Order. (48). Both the criminal complaint and information title the offense as Contempt of Court - Disobey Order. (1:1; 19:1). The verdict and the court's pronouncement of sentence state the offense as "contempt of court as charged in Count 2 of the Information." (41; 109:16). In addition, as noted earlier, disobedience of an order is among the disjunctive terms in the body of the charge. There was no proof that Mr. Wisth disobeyed an order. Yet, he stands convicted of doing so. Clearly, as a matter of law, the State failed to meet its burden to prove beyond a reasonable doubt that there was a contempt of court by disobeying an order. Therefore, the Judgement of Conviction for Contempt of Court - Disobey order must be reversed.

III THE MODIFIED JURY INSTRUCTION MISSTATED THE LAW AND WAS INSUFFICIENT, AS A MATTER OF LAW.

Where the jury instruction fails to accurately reflect the statute, we cannot review the sufficiency of the evidence using the jury instruction as the standard. State v. Beamon, 2003 WI 46, ¶ 22, 347 Wis. 2d 559, 830 N.W.2d 681.

Relying on an erroneous statement of the statute in the jury instruction as our standard, "would, in effect, allow the parties and the circuit court in that case to define an ad hoc, common law crime." Id at ¶ 23. "Allowing parties or courts to establish the requirements necessary to constitute a crime is contrary to the established principle in Wisconsin that there are no common law crime and that all crimes are defined by statute." Id.

A jury instruction that does not accurately state the statutory requirements for the crime charged is an erroneous statement of the law. Id. at ¶ 24(citations omitted.). Such errors are presumed to be subject to harmless error analysis.... "'so long as the error at issue does not categorically vitiate all the jury's findings.'" Id.(citation omitted.). "Often, such errors involve omissions from the jury instructions whereby the state is relieved of the burden of proving one or more requirements of the offense." Id.(citation omitted.)

Here, the jury was given a modified jury instruction as follows:

> Contempt of court as defined in Section 785.01(1)(b) of the Wisconsin statutes is committed by one who intentionally acts in disobedience, resistance, or obstruction of the authority, process, or order of a circuit court. Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present:
> 1. William a. Wisth was the defendant in an action pending before the circuit court;
> 2. William A. Wisth did an act in disobedience, resistance, or obstruction of the authority, process, or order of that court;
> 3. the defendant did this act intentionally.
>
> Intentionally means the defendant acted with the intent to disobey, resist or obstruct the authority, process or order of that court and acted with that purpose. You cannot look into a person's mind to find intent and knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, ad all

> the facts in this case bearing upon intent and knowledge.
>
> If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty. If you are not so satisfied, you must find the defendant not guilty.

(99:193-194). The trial court disagreed that this instruction failed to present a specific and clear instruction to the jury as to the nature of the violation claimed and the defendant's constitutional rights. (101:10, A-Ap. 102). Looking at Wis. JI-Criminal 2031, the trial court noted from comment no. 1 that it was an instruction "for one type of offense," namely, disobedience of a court order. (101:11-12; A-Ap. 102). Since such an offense was not present in this case, the court concluded the modified instruction was appropriate. Id. at 12.

The trial court indicated the State was "required to prove that the Defendant disobeyed, resisted, or obstructed the authority process or order of the Court." (101:10, A-Ap. 102). It further concluded, however, that requiring the state to specify the offense would write out of the statute the parts "that refer to obstruction of the authority and process of the court." Id. at 12. Apparently, the trial court overlooked its observation that the jury instruction committee viewed the statute's terms as stating different offenses. Further, apparently, it overlooked that if specifying the offense operates to improperly write out the other statutory terms, then Wis. JI-Criminal, which specifies disobey order, should include the remaining statutory terms, (resist, obstruct, authority, process), as well but it does not.

In any event, by modification of the instruction, the State was relieved of its burden to prove the first element set forth in the standard instruction as well as the crime charged, namely disobey a court order. As to the modified instruction, on the second element, by setting forth all of the alternative offenses, the State was relieved of its burden to prove Mr. Wisth guilty beyond a reasonable doubt as well as his right to a unanimous jury verdict. See, e.g., Jackson v. State, 92 Wis.2d 1, 9-10, 284 N.W.2d 685 (Ct. App. 1979). On the

third element, since the jury was not instructed that intent did not include words or statements constituting protected speech, it cannot be said that the jury did not apply the modified instruction to Mr. Wisth's protected speech and, moreover, lacking any other direction or guidance, likely did so. In other words, a reasonable likelihood exists that the jury applied the modified instruction to the detriment of Mr. Wisth's constitutional right to freedom of speech. See, State v. Perkins, 2001 WI 46, ¶ 43, 243 Wis. 2d 141, 626 N.W.2d 762. Obviously, first element of the modified instruction is not an element of the offense since the statute does not require it. See, Beamon, 2003 WI 46, ¶ 22. Thus, it is submitted that these errors are beyond harmless error in that they operate to vitiate all of the jury's findings. See, Id., ¶ 24. Clearly, reversal is required.

CONCLUSION

For the foregoing reasons, the defendant-appellant respectfully requests the Court to issue an order reversing the trial court and vacating his conviction as well as costs and surcharges.

Dated this 6th day of February, 2017.

Respectfully submitted,

STEWART LAW OFFICES

_____

Trisha Stewart Martin
State Bar No. 1016571
Attorney for Defendant-Appellant

APPENDIX

CERTIFICATION

I hereby certify that filed with this brief either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains: (1) a table of contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral and written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated 2/6/2017 _____

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(d) for a brief produced with a proportional font. The length of this brief is 5,157 words.

Dated 2/6/2017 _____

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