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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

Appeal Case No. 2016AP001484 CR
Trial Case No. 2014CF000220

WILLIAM A. WISTH,
Defendant – Appellant

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

BRIEF AND APPENDIX OF PLAINTIFF-RESPONDENT

Respectfully submitted,

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TABLE OF CONTENTS

TABLE OF AUTHORITY

Cases

Statutes

Other Authorities

Statement on oral argument and publication.

The Plaintiff-Appellant neither requests oral argument nor publication.

Certification as to form.

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief and appendix. The margins are 1.5 inches on the top and bottom, 2 inches on the sides so as to accommodate no more than 60 characters per line. Wis. Stats. § 809.81(4). The body of this brief is printed in double spaced Times New Roman proportional 13 point font, block quotes and footnotes are in 11 point Times New Roman font. The applicable portions of Appellant's brief have a total of 6,975 words and the whole brief consists of 28 pages. An appendix is attached and is not included in either the word or page count.

_____
Adam Y. Gerol
State Bar No. 1012502

Certification 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 s. 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.

_____
Adam Y. Gerol
State Bar No. 1012502

1. Statement of Facts:

William Wisth was charged with two crimes in Ozaukee County Case No. 2012CM000647. On the second day of trial, Wisth brought a large sign and handbills to court which attacked the trial judge in that case and impugned the court system. Wisth positioned himself at the courthouse entrance at the start of the day, and displayed his sign and handed his pamphlets out to people as they entered. This behavior became the subject another complaint, Ozaukee County Case No. 2014CM000220. This appeal follows his conviction in that case for criminal contempt.

The defendant's first claim is that his conduct was protected speech as a matter of law. Brief at 4-10. To rebut this argument, this brief includes portions of the record from the case where the contempt occurred. The remainder of the defendant's appeal is focused on the sufficiency of the pleadings and the evidence presented at trial. Facts drawn from the trial record in this case are recited in the second half of this statement of facts.

a. Facts from the record of the first case.

Ozaukee County Case No. 2012CM000647 was filed on October 15, 2012, and the trial commenced on July 29, 2014. (R.99:74) Over these 22 months the defendant was represented by two attorneys, both appointed by the trial court because the defendant's financial circumstances greatly exceeded the standards for public defender representation. (R.85:6-7, 15-17) The defendant was very well known to the Ozaukee County court system. (R.99:153) The trial judge was particularly aware of his conduct in an earlier divorce where there were substantial issues about his legal representation. (R.85:4-5) The trial judge was aware of the

defendant's irregular financial practices, that he was the subject of numerous judgments, and that he owed Ozaukee County over $100,000 in back taxes. (R.85:16) While the trial judge knew that the defendant's financial practices were suspicious, he believed that he was capable of contributing a nominal amount toward his representation in the case he was currently handling. (R.85: 5-7)

The defendant was appointed two very qualified attorneys, one who withdrew because of ethical concerns, the other because the defendant refused to comply with the financial conditions attached to his representation. (R.85:7-10) The trial judge had carefully chosen these specific attorneys because he knew they were skilled at working with difficult clients. (R.85:8) Numerous trial dates were set, only to then be adjourned. (R.85:8-9) The court finally concluded that there simply had to be an end the litigation. The judge personally believed it would have been easier to try the case with a defense attorney, but also knew that the defendant was simply trying to push the matter off. (R.85:8-9, 12) The trial court concluded that the defendant was manipulating the legal process and ordered the case to proceed. (R.85:12) The judge stated that "Mr. Wisth was doing everything he could to manipulate the system and to wag the dog, instead of having the dog wag the tail." (R.85:12) As to the defendant's course of conduct during trial, the court believed that it was an effort to create a mistrial and obtain another adjournment. (R.85:12-13, 49) (R.99:166-7).

b. Facts from the record of this prosecution.

The jury in this case learned that on the morning of the second day of trial, the defendant came to the courthouse with

a stack of printed pamphlets and a very large sign. (R.99:113) The pamphlets stated:

> **"Beware, beware. Do not trust Ozaukee County or Judge Paul Malloy. If you're a criminal defendant your rights will be taken away from you. "One, do not request an attorney. Two, the judge works in the DA's favor. Three, the judge will work in the favor of the police. Four, you cannot plead not guilty and get a fair trial in Ozaukee County. The judge should not be a judge," [with stars around that.] "Do not trust Judge Malloy or the Ozaukee County Sheriff's Department."**

The sign read:

> **"Do not trust Judge Malloy or Ozaukee Sheriff's Department. They are dishonest."**

The defendant arrived at the Justice Center at around 8:00 A.M. and positioned himself in front of the only public entrance to the courthouse. (R.99:77-9, 91, 112-3) The sign was visible to everyone, including the jurors as they entered the courthouse, and through the windows of the jury assembly room. (R.99: 82, 114) One juror reported to the jury clerk that the defendant had attempted to hand her something as she walked into the building. (R.99:78-9, 93, 108, 145). When the juror did not take the pamphlet, the defendant displayed his sign to her. (R.99: 177-8)

The language used in the defendant's pamphlets and sign only attacked only one of the judges in the courthouse, the judge that was trying the case against the defendant at that time. (R.99: 165-9) A reasonable inference from these facts was that the defendant was trying to infect the trial process and obtain a mistrial. The defendant was found guilty of

Contempt of Court, but acquitted of Attempting to Communicate with Jurors.

2. Argument.

a. Irrelevant material in the defendant's statement of facts.

The defendant recites some comments by the sentencing judge as to the necessity of criminal charges in this case. While the seriousness of the offense must be addressed in any criminal sentencing, these comments simply aren't relevant to this appeal. If prosecutive merit had somehow been anticipated to be an issue in this appeal, greater care would have taken to ensure that this record contained all the material from the case out of which this crime grew. At a minimum that record would have included Judge Malloy's comments when he became aware of what the defendant had done at the start of the day:

> THE COURT: I think there will be a contempt proceeding, but I don't know that it will be handled as summary contempt versus a contempt of court before another judge. I thought that through, and I thought that's the better way to go, given the conduct that we have here. The conduct up front did not take place in front of me. The conduct in court clearly is conduct that I would not normally tolerate, but I -- from any litigant; but I am balancing that.
>
> If we can find the juror that he approached and make sure that she can listen to the evidence still and that she can be fair to both sides, then I'm going to proceed. …

Transcript, Jury Trial Day 2, App. 2-3

b. Statement of the case.

There are only two inferences that can reasonably be drawn from the defendant's conduct and both were presented to the jury. First, was the defendant exercising his First Amendment rights? Or, was the defendant trying to disrupt the proceedings against him either by trying to influence the jurors or by creating enough of a disruption of those proceedings to achieve a mistrial? The jury rejected the innocent explanation and found, beyond a reasonable doubt, that the defendant was acting in contempt of court.

The defendant appeals this conviction on three grounds. First, he contends that his behavior on July 30, 2014 was protected speech as a matter of law. Second, he attacks the sufficiency of the proof against him, and; Third, he contends that the jury was improperly instructed.

c. The defendant's behavior was contempt of court.

The defendant may be correct that State ex rel. Attorney Gen. v. Circuit Court of Eau Claire City, 97 Wis.1, 72 N.W. 193 (1897) is the only reported Wisconsin case dealing with picketing outside the context of contemptuous behavior in violation of a specific court order or ordinance. Certainly, picketing is a classical form of free speech.

> It is paradigm that "[b]ecause First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity," N.A.A.C.P., 371 U.S. at 433, 83 S.Ct. at 338, and "[t]here is no doubt that as a general matter peaceful picketing and leafletting are expressive activities involving 'speech' protected by the First Amendment." United States v. Grace, 461 U.S. 171, 176, 103 S.Ct. 1702 1706, 75 L.Ed.2d 736 (1983). …

State v. Braun, 152 Wis.2d 500, 513, 449 N.W.2d 851 (Ct. App. 1989). However, the real issue at the heart of this appeal is whether there are circumstances where the governments interest in the fair administration of its justice system can outweigh the First Amendment. Fortunately, federal law provides a great deal of guidance on this subject. In Cox v. Louisiana, 379 U.S.559 (1965) the Supreme Court upheld a state law that prohibited picketing near a courthouse with the intent to obstruct justice. There, Supreme Court concluded that Louisiana law did not improperly infringe free speech because Louisiana has a legitimate interest in protecting its judicial system from pressures that picketing near a courthouse might create. Cox, at 562-564.

Cox involved a wildly different fact pattern than ours where a mob of 2,000 paraded and demonstrated in front of a courthouse protesting that 23 students had been 'illegally' arrested the day before. Cox, at 564-5. The Supreme Court held that regardless of whether a demonstration might be peaceful or intimidating, it was still lawful for Louisiana to protect against the possibility that the public might perceive legal proceedings to be affected by mob intimidation, and not to flow only from the fair and orderly working of the judicial process. Cox, at 565. Cox was primarily focused on the legality of an 'anti-picketing' statutes, as opposed to cases where trial court's had applied contempt powers to punish similar behaviors, such as Bridges v. California, 314 U.S. 252 (1941), and Pennekamp v. Florida, 328 U.S. 331 (1946). Cox, at 563. Wisconsin does not have a specific statute against picketing courthouses. Accordingly, the behavior being prosecuted must clearly justify the application of the 'general and undefined parameters of criminal contempt.' See generally, Bridges v. California Ex Rel. Times-Mirror Co., 314 U.S.252 (1941).

Contempt may take many forms:

> … Civil contempt is designed to coerce the contemnor to comply with a court order, and a civil contempt action is brought by a private party, not the court. For example, when a witness who has been given immunity still refuses to testify at trial, the court may confine him in jail until he agrees to testify or until the trial is finished, whichever comes first. The contemnor always has the ability to purge himself of contempt by obeying the court order. Criminal contempt is punitive rather than remedial. It punishes disobedience of the court's order as vindication of the court's authority. The contemnor serves a fixed sentence and cannot gain release by complying with the order. See Gompers v. Buck's Stove & Range Co., 221 U.S. 418, 441-445, 31 S.Ct. 492, 498-99, 55 L.Ed. 797 (1911); Skinner v. White, 505 F.2d 685, 688-689 (5th Cir. 1974).
>
> There are two types of criminal contempt, direct and indirect, and they differ mainly in procedure. When the offending behavior occurs in the presence of the judge, the court may summarily adjudge a contemnor guilty of direct criminal contempt without holding a separate contempt hearing. Summary punishment may only be imposed under narrowly circumscribed conditions, such as when the offensive behavior amounts to intentional obstruction of ongoing court proceedings. U. S. v. Brannon, 546 F.2d 1242, 1248 (5th Cir. 1977). Indirect contempt is committed outside the court's presence. One accused of indirect contempt, or direct contempt that does not merit summary punishment, is entitled to reasonable notice of the charges and a separate contempt hearing. U. S. v. Hankins, 624 F.2d 649, 652-53 (5th Cir. 1980).

Wolfe v. Coleman, 681 F.2d 1302, 1306 (11th Circuit, 1982). The conduct at issue here was the 'indirect' form of contempt. In re Oliver, 333 U.S. 257, 274 (1948); Citing Cooke v. United States, 267 U.S. 517 (1925). It is indirect contempt because the defendant did not commit any acts within the immediate presence of the judge.

Bridges v. California Ex Rel. Times-Mirror Co., 314 U.S.252 (1941) provides the standard to balance the freedom of speech against the governments legitimate interest in maintaining fair trials where the contempt power is applied against indirect acts.

> In brief, the state courts asserted and exercised a power to punish petitioners for publishing their views concerning cases not in all respects finally determined, upon the following chain of reasoning: California is invested with the power and duty to provide an adequate administration of justice; by virtue of this power and duty, it can take appropriate measures for providing fair judicial trials free from coercion or intimidation; included among such appropriate measures is the common law procedure of punishing certain interferences and obstructions through contempt proceedings; this particular measure, devolving upon the courts of California by reason of their creation as courts, includes the power to punish for publications made outside the court room if they tend to interfere with the fair and orderly administration of justice in a pending case; the trial court having found that the publications had such a tendency, and there being substantial evidence to support the finding, the punishments here imposed were an appropriate exercise of the state's power; in so far as these punishments constitute a restriction on liberty of expression, the public interest in that liberty was properly subordinated to the public interest in judicial impartiality and decorum.

Bridges at 259. In Bridges, a trial court found an editorial writer in contempt for an article titled "Probation for Gorillas?", where the writer predicted retribution if the trial court imposed a lenient sentence in a pending case. Bridges, at 271. The trial court found that this editorial interfered with the orderly administration of a case which was before the trial court for consideration at that time. The United States

Supreme Court rejected this reasoning, stating that if the First Amendment could be limited, than it may only be in response to "some serious substantive evil."

In Bridges, the government offered two evils to be averted by the use of the contempt power, disrespect for the judiciary; and disorderly and unfair administration of justice. In response to the first, the Court held:

> The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions. And an enforced silence, however limited, solely in the name of preserving the dignify of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect.

Bridges at 270. As to the second proposed evil to be averted, the Court found that this was a closer call:

> The other evil feared, disorderly and unfair administration of justice, is more plausibly associated with restricting publications which touch upon pending litigation. The very would [Sic] 'trial' connotes decisions on the evidence and arguments properly advanced in open court. Legal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper. But we cannot start with the assumption that publications of the kind here involved actually do threaten to change the nature of legal trials, and that to preserve judicial impartiality, it is necessary for judges to have a contempt power by which they can close all channels of public expression to all matters which touch upon pending cases. We must therefore turn to the particular utterances here in question and the circumstances of their publication to determine to what

> extent the substantive evil of unfair administration of justice was a likely consequence, and whether the degree of likelihood was sufficient to justify summary punishment.

Bridges at 271. The Bridges Court held that the alleged 'contemptuous statements,' taken in their context, did not have an 'inherent tendency' to disrupt the order of the court, nor did they present a substantial 'clear and present danger' to the trial court's ability to administer justice. Bridges, at 298. The Court found that the only real threat posed was the potential that more editorials might be written. Accordingly, the Court held that the use of the contempt power was improper.

The same arose again in Pennekamp v. Florida, 328 U.S. 331 (1946), where newspaper writers were found in contempt for publishing articles and cartoons criticizing the alleged leniency of a Florida trial court while a serious rape case was pending. The trial court sanctioned these writers, finding that they had impugned the integrity of the court, created public distrust for the court, willfully withheld and suppressed the truth, and tended to obstruct the fair and impartial administration of justice in pending cases. The Supreme Court clarified the 'clear and present danger' formula:

> *Bridges v. California* fixed reasonably well marked limits around the power of courts to punish newspapers and others for comments upon or criticism of pending litigation. The case placed orderly operation of courts as the primary and dominant requirement in the administration of justice. 314 U. S. 263, 314 U. S. 265, 314 U. S. 266. This essential right of the courts to be free of intimidation and coercion was held to be consonant with a recognition that freedom of the press must be allowed in the broadest scope compatible with the supremacy of order. A theoretical determinant of the

> limit for open discussion was adopted from experience with other adjustments of the conflict between freedom of expression and maintenance of order. This was the clear and present danger rule. The evil consequence of comment must be "extremely serious, and the degree of imminence extremely high, before utterances can be punished." 314 U. S. 263. It was, of course, recognized that this formula, as would any other, inevitably had the vice of uncertainty, 314 U. S. 261, but it was expected that, from a decent self-restraint on the part of the press and from the formula's repeated application by the courts, standards of permissible comment would emerge which would guarantee the courts against interference and allow fair play to the good influences of open discussion. As a step toward the marking of the line, we held that the publications there involved were within the permissible limits of free discussion.
>
> In the *Bridges* case, the clear and present danger rule was applied to the stated issue of whether the expressions there under consideration prevented "fair judicial trials free from coercion or intimidation." 314 U. S. 259. There was, of course, no question as to the power to punish for disturbances and disorder in the court room. 314 U. S. 266. The danger to be guarded against is the "substantive evil" sought to be prevented. 314 U. S. 261, 314 U. S. 262, 314 U. S. 263. In the *Bridges* case, that "substantive evil" was primarily the "disorderly and unfair administration of justice." …

Pennekamp, at 334-5. The central problem in these indirect contempt cases was that the conduct at issue did not present a substantial, clear and present danger to the actual business of the court. The lesson for this case is that in indirect contempt cases the actor must be doing something that presents a real and imminent threat to the actual activities of a court. Here, the defendant's behavior posed such a threat, and nearly resulted in the mistrial the defendant was hoping for.

In Turney v. Pugh, 400 F.3d 1197 (9th Circuit, 2005), a man approached members of a jury venire and told them to call the toll free number of the "Fully Informed Jury Association", a jury nullification enterprise. One of the jurors did, the case ended in hung jury, and the man was later charged with criminal conduct. Turney discussed the 'clear and present danger' test beginning with Bridges,, but Turney distinguished these from cases involving speech to jurors about pending cases. "In a criminal case, any private communication, contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial" unless made pursuant to court rules or other instructions. Turney at 1202; Citing Remmer v. United States, 347 U.S. 227, 229 (1954). Turney further stated:

> Even in the strongly speech-protective decisions of the Bridges-Wood line, the Court was careful to distinguish the publications it deemed protected under the First Amendment from speech aimed at improperly influencing jurors. As the Court observed in Bridges:" The very word `trial' connotes decisions on the evidence and arguments properly advanced in open court. Legal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper." …

Turney at 1202.

No 'safe harbor' for *pro se* litigants.

In U.S. v. Scarfo, 263 F.3d 80 (3rd Circuit, 2001), a disqualified attorney made extrajudicial statements about a pending criminal case. There, the 3rd Circuit Court of Appeals observed:

> … The Supreme Court "has held that the Constitution[does] not allow absolute freedom of

> expression -- a freedom unrestricted by the duty to respect others needs fulfillment of which makes for the dignity and security of man." Id. (citing Schenck v. United States, 249 U.S. 47 (1918). Justice Holmes's famous "clear and present danger" test is the penultimate embodiment in First Amendment law of the principle that freedom of speech is critically important, but that "its exercise must be compatible with the preservation of other freedoms essential to a democracy and guaranteed by our Constitution." Pennekamp, 328 U.S. at 353 (Frankfurter, J. concurring).

Scafo, 90-91. Here, the conduct and the message could have resulted in an ethics sanction for a licensed attorney. S.C.R 20:3.5(c); Office of Lawyer Regulation v. Sommers, 2012 WI 33, 339 Wis.2d 580, 811 N.W.2d 387. Behavior which would be subject to sanction if committed by a lawyer cannot be condoned when it's done by non-lawyer acting as his own attorney. Waushara County v. Graf, 166 Wis.2d 442, 480 N.W.2d 16 (1992). Pro se litigants must follow the same rules as attorneys. Farretta v. California, 422 U.S. 806, 834, n. 46 (1975). Acting as one's own attorney doesn't provide a license to manipulate court proceedings or engage in obstreperous or defiant behavior. Hamiel v. State, 92 Wis.2d 656, 673-74, 285 N.W.2d 639 (1979).

d. The defendant was correctly charged[1].

i. The Contempt power is not a creature of legislative authorization.

The defendant cites to State ex rel. Laning v. Lonsdale, 48 Wis. 348, 367, 4 N.W. 390 (1880) and Douglas County v. Edwards, 137 Wis.2d 65, 87-88, 403 N.W.2d 438 (1987)[2] for the proposition that the trial court was without jurisdiction to litigate this matter . Brief at 10. These cases don't support that contention.

Lehman (Douglas County) involved a trial court attempting to force Douglas County to pay for an attorney that had been appointed to act as stand-by counsel in a criminal case. While the trial court had used its contempt powers to compel the payment, the Wisconsin Supreme Court held that this wasn't necessary. Lehman at 87. These costs were part of the trial court's operating budget, and no other proceeding or order was necessary to compel the county provide funding. Ibid. However, in dicta, the Court held that contempt powers do not grow out of legislative enactments:

> The contempt power does not arise from the statute: "It is well settled beyond any question in Wisconsin that all courts have an inherent power to hold in contempt those who disobey the court's lawful orders. This power exists independently of statute...." In re Hon.

[1] The arguments in the defendant's brief from pages 10-12 are difficult to decipher. The State has attempted to meet these points as best as possible so as to avoid any claim of concession. Hoffman v. Economy Preferred Ins. Co., 2000 WI App 22, ¶9, 232 Wis. 2d 53, 606 N.W.2d 590 (Ct. App. 1999).

[2] Also cited as Contempt in State v. Lehman, or State v. Lehman, 137 Wis.2d 65, 403 N.W.2d 438 (1987).

> Charles E. Kading, 70 Wis.2d 508, 543b, 235 N.W.2d 409 (1975). Despite the fact that the power exits independently of statute, this court ruled, over one-hundred years ago, that when the procedures and penalties for contempt are prescribed by statute, the statute controls. State ex rel. Lanning v. Lonsdale, 48 Wis. 348, 367, 4 N.W. 390 (1880). This case has not been overruled, and we see no reason to do so in the present case.

Lehman at 87-88.

ii. Language used in the information.

The defendant attacks the choice of language in the charging document. Brief at 11. The information charged the defendant with violating Wis. Stats. § 785.01 (1)(b) which states:

> 785.01 (1) "Contempt of court" means intentional:…
>
> (b) Disobedience, resistance or obstruction of the authority, process or order of a court;

The information used in this case was sufficiently detailed and placed the defendant on notice of the charges being brought against him, as well as the available penalty. State v. Elverman, 2015 WI App 91, ¶¶ 16-18, 367 Wis. 2d 126, 876 N.W.2d 511. While it was not defective, any defect in the form of an information would not render the document invalid so long as that defect did not prejudice the defendant. Wis. Stat. § 971.26. Here, the defendant has not alleged any prejudice, and none is evident from the record. The Defendant clearly knew what he was being charged with and what the penalties where.

The defendant also discusses the allegations as stated in the criminal complaint. Brief at 11. A criminal complaint is no longer the charging document after arraignment.

iii. Failure to state an offense.

While a violation of Wis. Stats. § 785.01, criminal contempt, may not technically be a crime, it is an offense for which someone may be punished. . State v. Carpenter, 179 Wis.2d 838, 842, 508 N.W.2d 69 (Ct. App. 1993); See also Bloom v. Illinois, 391 U.S. 194 (1968). Champlain v. State, 53 Wis.2d 751, 754, 193 N.W.2d 868 (1972), referenced by the defendant, is inapplicable. In Champlain, the State failed to include a necessary element of the crime in its information which essentially rendered it a nullity. That simply didn't happen here. Further, the holding in Champlain has subsequently been modified. State v. Petrone, 161 Wis.2d 530, 557-8, 468 N.W.2d 676 (1991). An information which lacks a necessary element will still be sufficient so long as it cites to the correct statute. Ibid. Further, the defendant's own contention is that the information contained too many charging alternatives, as opposed to not enough. Brief at 11-12.

iv. Disjunctive and duplicitous pleading.

The defendant argues that because the State didn't specify which of the alternatives under Wis. Stats. § 785.01(1)(b) it was relying on, the jury verdict lacked unanimity. Brief at 11-12. This objection was not made at trial, nor in any post-conviction proceeding. (R.67) The trial court was never asked to either develop or decide this issue. A challenge to duplicity is waived unless it is raised in the

trial court. State v. Lomagro, 113 Wis. 2d 582, 590, n.3, 335 N.W.2d 583 (1983) .

That said, there was no error in the charging document. Duplicity is defined as the joining in a single count, two or more separate offenses as one charge. State v. Galarowicz, 2013 WI App 13, ¶19, n.2, 345 Wis.2d 848, 826 N.W.2d 123. The defendant claims that the charging document was flawed because it used disjunctive language. Brief at 11-12. However, the State may charge, and a jury may be instructed using disjunctive language. State v. Cheers, 102 Wis.2d 367, 401-6, 306 N.W.2d 676 (1981).

Cheers involved an armed robbery charge, a crime which has several different modes of commission. The Court held that it was unnecessary for the jury to agree on which specific methods of commission was used, so long as they agreed on the ultimate issue presented – was force used. Cheers at 401-2.

State v. Koeppen, 2000 WI App 121, ¶13, 16, 237 Wis. 2d 418, 614 N.W.2d 530 described the two-step process to applied when these types of unanimity claims are brought. Koeppen, ¶16. First, a court must determine whether a statute creates one offense with multiple modes of commission, or whether the statute creates multiple offenses with distinct crimes recited. Ibid. Referencing State v. Briggs, 214 Wis. 2d 281, 289, 571 N.W.2d 881 (Ct. App. 1997). Applying this process requires ascertaining the legislature's intent. Statutory construction begins with the plain meaning of the statute. State ex rel. Kalal v. Cir. Ct. for Dane Cty., 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110. Statutory intent involves looking at four factors; First, the language of the statute; Second, the legislative history and

context of the statute; Third, the nature of the proscribed conduct; and, Fourth, the appropriateness of multiple punishment for the conduct." Id at ¶17; Citing Manson v. State, 101 Wis. 2d 413, 422, 304 N.W.2d 729 (1981).

Here, the legislature recites one offense with alternative means of commission. None of the alternatives listed -- disobedience, resistance or obstruction of the authority, process or order of a court – is mutually exclusive. They all share conceptual similarity. See generally Cheers, at 400.

> Because the evidence may demonstrate situations where the line between a statute's alternative modes of commission is not clear, the jury does not have to split hairs over nomenclature and agree on the precise term for the conduct; instead, it must agree on the factual theory or concept that makes the defendant liable for the crime. *See State v. Baldwin*, 101 Wis. 2d 441, 450, 304 N.W.2d 742 (1981).

Koeppen, ¶18. The concept behind each of these alternative methods of committing contempt is the same – that the defendant did an act with the purpose of interfering with a trial court's ability to conduct its business.

Here, there was only one continuous act, albeit using a sign and handbills. The State has discretion to couple separately chargeable offenses into one count as long as the offenses were committed "by the same person at substantially the same time and relating to one continued transaction." See State v. Lomagro, 113 Wis.2d 582, 587–89, 335 N.W.2d 583 (1983).

v. Failure to include facts in the pleading.

The defendant appears to attack the sufficiency of the criminal complaint. Brief at 12. Here, the defendant was charged with a felony and a misdemeanor, but only convicted of the misdemeanor. Nonetheless, when a defendant is charged with a felony, the charging document is the information. Wis. Stats. § 971.01, Stats.; Day v. State, 52 Wis.2d 122, 124-25, 187 N.W.2d 790, 791 (1971). An information ordinarily does not recite facts. Wis. Stats. § 971.03. This information was filed after a preliminary hearing was held on December 12, 2014 for the underlying case, as well as a related case where the defendant was charged with Simulating Legal Process. (R.95)

3. Sufficiency of the evidence.

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, 451N.W.2d 752 (1990). If the record supports more than one inference, an appellate court must accept and follow the inference drawn by the trier of fact, unless the evidence on which that inference is based is incredible as a matter of law." Id. at 506-07. An appellate court need only decide whether the theory of guilt, accepted by the trier of fact, is supported by sufficient evidence. Id. at 508.

The defendant's conduct in this case was clearly intended to disrupt court proceedings against him. He

engaged in this behavior in front of the only public entrance to the courthouse, in view of the jury assembly room. He tried to hand his materials to a juror. A reasonable inference from these facts is that his goal was to disrupt the court proceedings against him.

4. Sufficiency of the jury instructions.

The defense did not object to the instructions as given. (R.99:10, 182) Failure to object to an instruction deprives the trial court of the ability to make a record, improve the proposed instructions and cure any possible error. See generally, State v. Paulson, 106 Wis.2d 96, 315 N.W.2d 350 (1982).

The test to be applied where a party claims on appeal that a jury instruction should be reviewed, in spite of a waiver of objections, is whether the error is so plain or fundamental as to affect the defendant's substantial rights. State v. Jorgensen, 2008 WI 60, ¶ 21, 310 Wis.2d 138, 153–154, 754 N.W.2d 77, 84–85; Paulson at 105;

There is no pattern jury instruction for the offense charged. The defendant was charged with violating Wis. Stats. § 785.01(1)(b). The jury was given the following instruction:

> Contempt of court as defined in sec. 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 a defendant in an action pending before a 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 that 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, and from all the facts and circumstances 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.

(R.38:3-4)(R.99:193-4)

The purpose of a jury instruction is to fully and fairly inform the jury of the applicable law to be applied to the case. State v. Hubbard, 2008 WI 92, 313 Wis.2d 1, 752 N.W.2d 839. (Citations omitted.) The trial court has broad discretion when giving requested jury instructions. State v. Coleman, 206 Wis.2d 199, 212, 556 N.W.2d 701 (1996); State v. Vick, 104 Wis.2d 678, 690, 312 N.W.2d 489 (1981). Instructions should assist the jury in performing a reasonable analysis of the evidence. Id.

The defendant continues to argue that punitive contempt can only occur where there is a violation of an

actual court order. Brief at 15. Wis. Stats. § 785.01 is not so restrictive. While this may be the type of conduct that Wis. JI-Criminal 2031, Contempt of Court was drafted for, the inclusion or non-inclusion of a crime in the list of pattern jury instructions is irrelevant. There simply isn't a pattern jury instruction for every offense.

However, in retrospect, the State does believe there was an error in the instructions as given, but not an error that prejudiced the defendant. Jury instruction errors are subject to aharmless error analysis. State v. Beamon, 2013 WI 47, ¶24, 347 Wis.2d 559, 830 N.W.2d 681. A violation of Wis. Stats. § 785.01(1)(b) does not require an offender to have been 'a defendant in an action pending before a court.' Conceivably, any person committing the last two elements of the instruction given here could be convicted of this offense.

5. Conclusion

For the above stated reasons the State of Wisconsin prays that the appeal of the Defendant be denied and the judgment of the lower court be upheld.

Respectfully Submitted this 24th day of March, 2017

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Adam Y. Gerol
Ozaukee County District Attorney
State Bar No. 1012502

APPENDIX

Index to Appendix:

Appendix Certification:

I certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation 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.

_____

Adam Y. Gerol
State Bar No. 1012502