STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. Appeal No. 16 AP 2036

Keith J. Eggum,

Defendant-Appellant.

DEFENDANT-APPELLANT'S BRIEF

APPEALED FROM WAUKESHA COUNTY
CIRCUIT COURT
CASE NO. 14 CF 758
THE HONORABLE
RALPH M. RAMIREZ, PRESIDING

KAY & KAY LAW FIRM
BY: NOLAN A. JENSEN
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STATEMENT OF ISSUES

I. DID THE CIRCUIT COURT INCORRECTLY HOLD THAT EGGUM'S STATEMENTS WERE NOT PROTECTED BY THE FIRST AMENDMENT.

The Trial Court answered: "NO."

Appellant argues: "YES."

Respondent would argue: "NO."

II. DID THE CIRCUIT COURT IMPROPERLY INSTRUCT THE JURY WHEN ONLY MINOR CHANGES WERE MADE TO A JURY INSTRUCTION WHICH HAS BEEN AUTHORITATIVELY CONSTRUED.

The Trial Court answered: "NO."

Appellant argues: "YES."

Respondent would argue: "NO."

III. DID EGGUM RECEIVE A FAIR AND IMPARTIAL TRIAL WHEN HE WAS DENIED A HAIRCUT AND THERE WAS A HEIGHTENED SHOW OF POLICE FORCE WITHIN THE COURTROOM.

The Trial Court answered: "YES."

Appellant argues: "NO."

Respondent would argue: "YES."

STATEMENT ON ORAL ARGUMENT

Defendant-Appellant, Keith J. Eggum, does not request oral argument in this appeal. The issue on this appeal is clear and may be fully addressed through briefs of the parties.

STATEMENT ON PUBLICATION

Defendant-Appellant, Keith J. Eggum, request publication in order to clarify disorderly conduct law and the disorderly conduct jury instructions.

STATEMENT ON THE CASE

This appeal arises from the trial court's Order Denying Defendant's Post-Conviction Relief dated October 5, 2016, [R.75], issued by the Honorable Ralph M. Ramirez and from the judgment of conviction entered by the trial court on March 7, 2016. [R.62]. For purposes of this appeal, Defendant-Appellant, Keith J. Eggum, will hereinafter be referred to as "Eggum" and the State of Wisconsin will hereinafter be referred to as "State."

STATEMENT OF FACTS

Keith Eggum attend an event known as "The Rumble by the River" in Big Bend, Wisconsin, on July 12, 2014. [R.93:86]. This event is a tractor and truck pull sponsored by Big Bend. [R.93:86]. Throughout the day and into the night, drinking was encouraged in the beer tent. [R.93:88]. In the evening, a band played, and further drinking likely ensued.

It rained on and off the entire day of July 12, 2014. During a break in the storm at approximately 9:00 pm, the police made the decision to shut the festival down and usher the hundreds of intoxicated patrons to their cars. [R.93:91-2]. The

police asserted this was for safety reasons. Some patrons voice displeasure but acquiesced.

Police Chief Gaglion made the decision to send the festival goers to their cars. As his force began a gentle "push" to move everyone out of the beer and band tent, Chief Gaglion came upon Eggum. Eggum refused to leave, he had unused beer tickets and he intended to remain in the tent. [R.93:94]. It should be noted, the Rumble by the River Website from 2014 happily advertises "NO REFUNDS / NO RAINCHECKS." [R.73: Ex. A]. After an approximately 6 min conversation, with Chief Gaglion requesting Eggum leave, and Eggum responding with words along the lines of "suck my dick" and "I'll sleep in this tent," Chief Gaglion placed Eggum under arrest for disorderly conduct. [R.93:96]. Eggum was walked to a police car where he refused to enter. He was electrocuted by a Taser, and then complied with officer's commands.

PROCEDURAL HISTORY

The defendant, Keith Eggum, was charged with Battery of a Peace Officer–Repeater, Disorderly Conduct–Repeater, and

Resisting an Officer–Repeater in Case No. 14CF758, by a criminal complaint filed on July 14, 2014. The defendant was subsequently charged with Bail Jumping in Case No. 14 CF862, filed on July 31, 2014.

On October 9, 2014, a status conference was held regarding both cases. At that time, the Court notified the State and the defendant of its intended to try the cases jointly as a single trial. The defendant voiced his agreement with that decision. [R.81:4]. At the jury status hearing on December 1, 2014, the State motioned to dismiss the Battery of a Peace Officer–Repeater charge, leaving three counts for trial. [R.82:5-6]. On December 2, 2014, a jury trial was held in both cases. At the conclusion of the trial, the jury convicted on all three remaining counts. [R.83:204].

On July 22, 2015, first appellate counsel, Atty. Brian Hagner, motioned for a new trial for failure to conduct a colloquy with the defendant pursuant to *State v. Klessing*, 211 Wis. 2d 194, 564 N.W.2d 716, 722 (1997). An evidentiary hearing was held on August 28, 2015, where the Court issued an order vacating the prior convictions.

Eggum was appointed trial counsel Atty. Bradley J. Bloch for the State's second attempt at securing a conviction. A motion hearing to dismiss the Disorderly Conduct and Resisting or Obstructing an Officer charges was held on December 18, 2015. [R.90-91]. Atty. Bloch argued that these charges were in violation of the First Amendment, citing extensive case law. The Court believed that this case presented a factual issue and denied the Motion to Dismiss. [R.91:21].

The second jury trial occurred on February 2, 2016. [R.93]. This trial addressed only the Disorderly Conduct and Resisting an Officer Charges. The trial commenced with Eggum complaining that he had never received a haircut. [R.93:4-9]. The Court had pictures taken of Eggum's hair and proceeded. [R.93:15]. Additionally, Atty. Bloch voiced concerns about possible mental illness concerns with Eggum's conduct in court and while in custody. [R.93:5-6].

The jury was instructed using the base 1900 jury instruction, which was objected to by Atty. Bloch. [R.93:230]. After arguments, the Court simply redacted "indecent, profane, boisterous, unreasonably loud" from the 1900 jury

instruction–keeping the remaining language the same. [R.93:231].

The Jury convicted Eggum on the Disorderly Conduct Charge and acquitted him on the Resisting an Officer Charge. [R.93:276-279]. Eggum was sentenced on March 4, 2016 to time served. [R.94:9]. Eggum's mother requested the court consider whether Eggum could serve the remainder of his sentence in a mental health treatment facility. [R.94:10]. Eggum filed his notice of intent to pursue post-conviction relief on March 11, 2016. [R.64].

On June 17, 2016, the final transcript was received by appellate counsel. The post-conviction motion was filed on August 15, 2016. [R.73]. On October 5, 2016 a post-conviction motion hearing was held, where the circuit court heard arguments and denied the post-conviction motion. The notice of Appeal was filed on October 17, 2016. [R.77]. This appeal follows.

ARGUMENT

I. STANDARD OF REVIEW.

Questions of constitutionality are reviewed without deference to circuit court's decision. See *Schopper v. Gehring*, 210 Wis.2d 208, 565 N.W.2d 187 (Wis. App. 1997), See also *In re Opichka*, 2010 WI 110, 327 Wis.2d 463, 780 N.W.2d 159.

The circuit court's decisions regarding jury instructions and the appearance of the defendant should be reviewed for an erroneous exercise of discretion. See *White v. Leeder*, 149 Wis.2d 948, 954, 440 N.W.2d 557 (1989). However, whether a jury improperly applied a jury instruction in violation of a defendant's constitutional rights is, again, reviewed *de novo*. *State v. Jones*, 2013 WI App. 30, ¶10, 346 Wis.2d 280.

II. THE CHARGES AGAINST EGGUM SHOULD HAVE BEEN DISMISSED PRIOR TO TRIAL, BECAUSE EGGUM'S STATEMENTS WERE CONSTITUTIONALLY PROTECTED SPEECH.

Based upon testimony from trial, Eggum was arrested purely for voicing his opposition to police, and apparently for the impact Eggum's message had on the surrounding patrons of the beer tent. As Chief Gaglione put it, "The disorderly conduct

was evident on how loud he was getting and boisterous." [R.93:103]. "Eggum acted in a disorderly, loud, boisterous way." [R.93:131].

This action was allowed to proceed, because Eggum was alleged to have poke the Chief in the chest early in their conversation. [R.91:21]. There the Court stated,

> In any event, he was angry. He was displeased with the actions of the Government officials. He voiced his opposition to those actions. And if he had done that and that alone, I believe that this Court could readily state that he was punished for exercising his right to speak out against the government . . . . There was evidence of the Chief being poked in the chest, and a refusal to leave under the circumstances may or may not have constituted Mr. Eggum's Right to protest Government actions.

[R.91:21].

Chief Gaglione did testify that Eggum had put a finger in his chest, but he stated that he continued to talk with Eggum. [R.93:99]. Finger poking was not corroborated by Sgt. Karen Dingman. [See generally R.93:163-205] It was not until Eggum became loud a boisterous in his protesting of police action, that Chief Gaglione decided to arrest him. [R.93:131]. Yet, Chief

Gaglione admitted that it was not Eggum's loudness which got him arrested; it was the fact that Eggum was causing a disturbance. [R.93:133]. Chief Gaglione had managed protesters 10 times louder than Eggum while in Milwaukee. [R.93:132].

This is a simple case. The Big Bend municipality hosted an event promoting loud trucks, alcoholic beverages, and music. This event happily advertises "NO REFUNDS / NO RAINCHECKS." [R.73: Ex. A]. The government, by its agents, decided to shut the event down. When Eggum was asked by the police to leave, he protested–responding with a colloquial "no." [R.93:96]. Eggum was arrested for his verbal refusals, and because his refusals were "causing other people to look on to see what was going on." [R.93:161].

Eggum's arrest for disorderly conduct does not fall within the applicable case law regarding the first amendment.

Section 947.01(1), Wis. Stat. Has been authoritatively construed by the Wisconsin Supreme Court. Thus, lower courts are bound by the 2001 Wisconsin Supreme Court's authoritative construction, holding that the statute's sanctions "cannot be

applied to speech," *State v. Douglas D.*, 2001 WI 47, ¶ 21, 243 Wis.2d 204, or "conduct," *State v. A.S.*, 2001 WI 48, ¶ 12, 243 Wis.2d 173, protected by the constitution or its First Amendment. Section 947.01 may sanction "only categories of speech that have been traditionally regarded as beyond the protection of the First Amendment," *Id*. ¶ 16, so that the charge "does not result in the statute becoming overly broad." *Id*. This construction of the statute's "scope," *Id*., ¶ 11, was termed by the Wisconsin Supreme Court as its authoritative construction, *Douglas D.*, ¶21, note 6, and "that courts must analyze statutes 'as authoritatively construed.'" *Id*., note 6.

This construction triggers the requirement that the State ensure that a defendant is convicted under the statute as construed and not as originally written. *Osborne v. Ohio*, 495 U.S. 103, 118, 110 S.Ct. 1691 (1990), See also, *Shuttlesworth v. Birmingham*, 382 U.S. 87, 86 S.Ct. 211 (1965).

As the evidence presented at trial and the motion hearings show, Eggum was convicted based purely upon his constitutionally protected words. Eggum was not arrested for allegedly poking Chief Gaglione in the chest. Neither was

Eggum arrested for being loud. [R.93:131, 133]. Instead he was arrested for the content of his speech.

As Chief Gaglione put it, Eggum was arrested because his statements were "causing other people in the area to turn and see the disturbance because he was causing that much of a disturbance." [R.93:132].

However, when courts consider constitutionally protected speech, it is not the effect on the listener which is considered. *Cohen v. California*, 403 U.S. 15, 22 (1971) ("we do not think the fact that some unwilling 'listeners' in a public building may have been briefly exposed to it can serve to justify this breach of the peace conviction . . .").

Therefore, if Eggum was arrested for his speech, it must have fallen within one of two exceptions to the first amendment. One exception being a "true threat." *Douglas D.*, 2001 WI 47, 243 Wis. 2d 204, ¶¶ 4-6, 14. The other exception being for "fighting words." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573, 62 S.Ct. 766 (1942).

Eggum's comments, although vulgar, were constitutionally protected speech. The comments were not a

true threat. *Virginia v. Black*, 538 U.S. 343, 359-360, 123 S.Ct. 1536, 155 L.Ed.2d 535, 552 (2003). A true threat are statements which a "speaker means to communicate a serous expression of an intent to commit an act of unlawful violence to a particular individual . . ." *Id*. at 359. Eggum's only arguable threat, was his claim that he would sleep in the tent. This was not a threat of "unlawful violence."

The comments were not fighting words, based upon who they were directed at. *City of Houston v. Hill*, 482 U.S. 451, 107 S.Ct. 2502, 2509-2510, 96 L.Ed.2d 398 (1987). "[A] properly trained officer may reasonably be expected to exercise a higher degree of restraint than the average citizen, and thus be less likely to respond belligerently to fighting words." *Id*. at 462.

Instead of any traditional category of proscribable expression, it is clear that Eggum was arrested due to the offensiveness to the Big Bend Police. Because of the improper arrest, Eggum's conviction for disorderly conduct should be vacated and the charge dismissed.

III. THE JURY WAS INCORRECTLY INSTRUCTED REGARDING THE FIRST AMENDMENT'S RELATION TO DISORDERLY CONDUCT.

Eggum was convicted under jury instructions, without mention of the first amendment. The only modification from the base instructions was the removal of "indecent, profane, boisterous, unreasonably loud." [R.93:231]. In a yearly study conducted by Newseum Institute in partnership with *USA TODAY*, an estimated 39% of the population is unable to name even a single right located within the First Amendment. [The 2016 State of the First Amendment, Newseum Institute, located here[1]: (Sample 1,006 American Adults with +/- 3.2%, with a statistical significance of 95%).

Without a general knowledge, and without instruction, it was impossible for the jury to understand the intricacies of the First Amendment – including the Wisconsin Supreme Court authoritatively construing the overbroad Wis. Stat. § 947.01. *State v. Douglas D.*, 2001 WI 47, ¶21, 243 Wis. 2d 204, 608

[1]http://www.newseuminstitute.org/wp-content/uploads/2016/06/FAC_SOFA16_report.pdf

N.W.2d 438. The statute, and jury instruction should have been severely limited when presented to the jury.

> Because the disorderly conduct statute only proscribes speech that is not constitutionally protected, it does not result in the statute becoming overly broad. As Douglas D. Concludes, the disorderly conduct statute does not infringe on speech that is protected under the first Amendment because the **statute sanctions only categories of speech that have been traditionally regarded as beyond the protection of the First Amendment.** Thus, A.S.'s speech can be prosecuted only if his speech is one of the limited categories of speech that fall outside the protections of the first amendment.

State v. A.S., 2001 WI 48, ¶16, 243 Wis.2d 173, 189-190, 626 N.W.2d 712 (emphasis added) (internal citations omitted).

The jury instruction provided makes no mention of the first amendment protections. [R.54]. Instead, only indecent, profane, boisterous, and unreasonably loud were removed from the base instruction.

The jury instruction did not address the current state of the law when dealing with constitutional speech. Even though speech can only be prosecuted if it falls "outside the protections of the first amendment." *Id*.

Trial counsel submitted a revised version of Jury Instruction 1900, which was rejected by the court. [R.47] [R.93:18-20]. Trial counsel's revised jury instruction attempted to correct errors in the current instruction, which has not had substantive revisions since 1966. See comment to Wis JI-Criminal 1900. Without including first amendment laws in the jury instruction provided, the jury could easily have mistaken offensive speech for offensive conduct. Thereby finding Eggum guilty for statements that Eggum had a constitutional right to make.

Because of the errors in the jury instruction provided, this Court should order the circuit court to vacate the judgment of conviction and grant a new trial.

IV. EGGUM DID NOT RECEIVE A FAIR AND IMPARTIAL TRIAL.

It has long been held that the conduct of a criminal trial should be fair and impartial. See Generally *State v. Payne*, 199 Wis. 615, 227 N.W. 258 (1929). "The court has an independent interest in ensuring that criminal trials are conducted within ethical standards fo the profession and that legal proceedings

appear fair to all who observe them." *State v. McMorris*, 2007 WI App 231, ¶20, 306 Wis. 2d, 79, 742 N.W.2d 322. In order for a presumption of innocence to be effective, courts must guard against practices which unnecessarily mark defendant as having dangerous character or suggest guilt is a foregone conclusion. *Harrell v. Israel*, 672 F.2d 632 (7th Cir. Wis. 1982).

Recent evidence shows, jurors are susceptible to even minor influences, like "unattractive harshness" and "attraction leniency." [R.73: Ex. B to Eggum's Post-Conviction Motion "When Emotionality Trumps Reason: A study of Individual Processing Style and Juror Bias" 2010, Gunnell J.D., Ceci, Ph.D,].

A. Eggum Was Denied a Haircut Prior to Trial.

A disheveled defendant cannot be granted a fair and impartial trial. After Eggum repeatedly complained about his appearance, several pictures were taken of Eggum's hair. [R.57]. These two pictures from trial show Eggum hair noticeably disheveled. Whereas two pictures from the Wisconsin Department of Corrections show Eggum's hair

undoubtedly shorter. [R.73: Ex. C, D]. Based upon documents Eggum sent to the court, it is clear this issue is important to Eggum. [R.59, Envelope containing newspaper clippings regarding proper grooming.]

The United State's Supreme Court has held, absent a specific state interest, a defendant should not be physically restrained within view of the jury. See Generally *Deck v. Missouri*, 544 U.S. 622 (2005). The reasoning behind this was that shackles (1) undermine the presumption of innocence and the related fairness of the fact finding process, (2) interfere with the defendant's ability to communicate with his or her lawyer, and (3) affront the dignity and decorum of judicial proceedings. *Id*. at 630-32.

Allowing Eggum to present a clean cut appearance to the jury was integral to the "courtroom's formal dignity, which includes the respectful treatment of defendants. . ." *Id*. at 631. Further, the appearance of the defendant has been shown to cause bias's in the jury's rulings. *See, supra,* "When Emotionality Trumps Reason." Eggum repeatedly asked for a

haircut to present a more proper defendant to the jury, but he was not granted this request. [R.92:4; R.93:4-9].

B. Eggum Was Prejudice by the Show of Force in the Courtroom During Trial.

When the trial began there was a significant police force present in the courtroom. [R.93:16-17]. Eggum vehemently protests this greater show of force.

Current case law allows for this greater show of force. See *Jones v. State*, 66 Wis.2d 105, 114, 223 N.W.2d 889 (1974) (no prejudice where court repeatedly admonished the jury not to make inference from the higher prison guard presence); See also *State v. Clifton*, 150 Wis.2d 673, 443 N.W.2d 26 (Wis. App. 1989), review denied.

However, again, based upon recent studies it is apparent juries consider far more than just the facts presented to them. The case law related to what the jury sees and considers should be reevaluated and overturned where it allows convictions based on improper inferences. If the jury took into account a higher police presences or Eggum's disheveled appearance, Eggum should be granted a new, fair, and impartial trial.

CONCLUSION

The Trial Court erred in not dismissing this case as the motion stage. Eggum's speech was not disorderly conduct and Eggum should not have been arrested.

Therefore Defendant-Appellant, Keith Eggum, respectfully requests this Court remand this case and order the circuit court to vacate the judgment of conviction and dismiss the charges. Or, in the alternative, grant a new trial to address the issues related to the jury instruction, Eggum's appearance, and the heightened police force in the courtroom.

Dated this 4th day of JANUARY, 2016.

Respectfully submitted:

ATTORNEY FOR APPELLANT

s/ NOLAN A. JENSEN

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CERTIFICATION

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 produced with a proportional serif font.

The length of this brief is 3063 words.

Signed:

s/ NOLAN A. JENSEN

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CERTIFICATION OF ELECTRONIC FILING OF BRIEF

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. § 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.

Dated this 4th day of JANUARY, 2016.

ATTORNEY FOR APPELLANT

s/ NOLAN A. JENSEN

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CERTIFICATION OF ELECTRONIC FILING OF APPENDIX

I hereby certify that I have submitted an electronic copy of this appendix, which complies with the requirements of Wis. Stat. § 809.19(13).

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Dated this 4th day of JANUARY, 2016.

ATTORNEY FOR APPELLANT

s/ NOLAN A. JENSEN

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CERTIFICATION OF APPENDIX

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 Wis. Stat. § 809.12(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under Wis. Stat. § 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit 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 person, 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.

Signed:

s/ NOLAN A. JENSEN

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CERTIFICATION OF MAILING

I hereby certify this brief and appendix was deposited in the United States mail for delivery to the Clerk of the Court of Appeals by first-class mail, or other class of mail that is at least as expeditious, on **JANUARY 4, 2016**. I further certify that th brief and appendix was correctly addressed and postage was pre-paid.

Signed:

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