STATE OF WISCONSIN

COURT OF APPEALS
DISTRICT II

Appeal No. 16AP2036
Waukesha County Circuit Court Case No. 14CF758

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KEITH J. EGGUM,

Defendant-Appellant.

On Appeal From the Judgment of Conviction and the Order Denying Postconviction Relief Entered by Branch 3 of the Waukesha County Circuit Court, the Honorable Ralph M. Ramirez Presiding

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BRIEF OF PLAINTIFF-RESPONDENT

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QUESTIONS PRESENTED

1. Were Keith J. Eggum's statements constitutionally protected speech?

2. Was the jury incorrectly instructed regarding the first amendment's relation to disorderly conduct?

3. Did Keith J. Eggum receive a fair and impartial trial?

BRIEF ANSWER

The Circuit Court correctly held that Mr. Eggum's statements were not constitutionally protected speech, the jury was correctly instructed on the charge of disorderly conduct, and Mr. Eggum received a fair and impartial trial.

POSITION ON ORAL ARGUMENT AND PUBLICATION

The Plaintiff-Respondent ("State") submits that oral argument is unnecessary because the issues can be set forth fully in the briefs. Publication is unnecessary as the issues presented relate solely to the application of existing law to the facts of the record.

STATEMENT OF THE CASE

As the plaintiff-respondent, the State exercises its option not to present a full statement of the case. Wis. Stat. § 809.19(3)(a)(2) (2017).

ARGUMENT

This court should uphold the circuit court's factual findings unless clearly erroneous, but should review the circuit court's application of the facts to constitutional principles *de novo*. *State v. Stout*, 2002 WI App 41, ¶9, 250 Wis. 2d 768, 641 N.W.2d 474. When reviewing the use of jury instructions and the prejudicial effect of Mr. Eggum's appearance at trial, this Court must uphold the trial court's decision on those matters unless the exercise of discretion was erroneous. *White v. Leeder,* 149 Wis.2d 948, 954, 440 N.W.2d 557 (1989).

I. MR. EGGUM'S ACTIONS WERE NOT CONSTITUTIONALLY PROTECTED FREE SPEECH.

Reviewing constitutional issues *de novo*, this Court should find that Mr. Eggum's actions were not constitutionally protected free speech, and affirm the circuit court's finding on this matter. Mr. Eggum argues that he was arrested purely for "voicing his opposition" to police and this is in violation of his right to free speech under the First Amendment of the United States Constitution. However, in light of the totality of the

circumstances, Mr. Eggum's conduct on the night of his arrest fell squarely within the Wisconsin Statute for Disorderly Conduct, Wis. Stat. § 947.01.

Wisconsin's "Disorderly Conduct" law is covered by Wisconsin Statute Section 947.01. Wis. Stat. § 947.01 (2017).Wisconsin courts have held that state disorderly conduct laws are "aimed at proscribing conduct in terms of the results that could be reasonably expected therefrom." *State v. A.S.,* 2001 WI 48, ¶13, 243 Wis. 2d 173, 626 N.W.2d 712. Wisconsin disorderly conduct laws could limit certain speech from use by the public, but this limitation is a lesser cost the State is willing to bear to appropriately address the countervailing interest in preserving public order. See *Feiner v. New York,* 340 U.S. 315, 320, 71 S. Ct. 303, 95 L. Ed. 295 (1951); *State v. Zwicker,* 41 Wis. 2d 497, 509, 512-513, 164 N.W.2d 512 (1969). See also *State v. Reidinger,* 2016 WI App 18, 367 Wis. 2d 350, 876 N.W.2d 179.

When assessing whether particular conduct is "disorderly," one must consider the conduct itself and the circumstances in which the conduct occurred. See *City of Oak Creek v. King,* 148 Wis. 2d 532, 542, 436 N.W.2d 285, 286-87 (1989). Disorderly conduct has typically "'resulted from the inappropriateness of specific conduct because of the circumstances involved.'" *Id.* at 543 (quoting *State v. Werstein,* 60 Wis. 2d 668, 672-73, 2111 N.W.2d 437 (1973)).

In *City of Oak Creek v. King*, the Supreme Court emphasized multiple cases where the Court had stressed that the surrounding circumstances are essential to determining whether something was "otherwise disorderly." *Id.* at 542. Further, the Court addressed that disorderly conduct does, in certain circumstances, include conduct that might otherwise be protected by the First Amendment. *Id.* The Court discussed *State v. Givens*, 28 Wis. 2d 109, 135 N.W.2d 780 (1965), wherein the Court affirmed a conviction for disorderly conduct for demonstrators conducting a "sit-in" in a small municipal office, where the demonstrators had made a forcible entry into the office and disrupted the office's orderly functioning. *Id.* The Court also discussed *State v. Elson*, 60 Wis. 2d 54, 208 N.W.2d 363 (1973), in which the Court affirmed a conviction of an attorney for "too vigorously disrupting the denial of his right to converse with his client because of the fact that such protestation occurred in the ward of a mental hospital." *Id.* at 543. In *State v. Zwicker*, the Court held that obstructing hallways and using signs in a demonstration against a chemical manufacturer in a university building was, under the circumstances, disorderly conduct. *King*, 148 Wis. 2d at 542-43; *Zwicker*, 41 Wis. 2d at 502-03. The purpose of the *King* Court addressing each of these cases was to demonstrate that conduct it considers "otherwise disorderly" can result from the inappropriateness of the conduct given the

totality of the circumstances involved, even if that conduct might be otherwise protected under the First Amendment. *King*, 148 Wis. 2d at 543.

In light of the circumstances, the statements made and conduct displayed by Mr. Eggum on the night of his arrest fall within what is considered "disorderly conduct" in Wisconsin. As Mr. Eggum explained in his brief, officers were on foot patrol at the Rumble by the River, a festival and tractor pull event. When lightning and storms rolled in, the officer thought it was a safety risk to continue the event due to the pooling of the water in the tent and electrical wiring. (Jury Trial Transcript, 88:21-25, 90:8-25). As a safety precaution, officers sought to remove individuals from the premises. (Jury Trial Transcript, 91:13-17, 92:9-14).

Thus, the officers' request that Mr. Eggum leave the premises was first based upon officers' safety concerns regarding the dangerous weather. His refusal to leave when requested to do so was the action that caused a disturbance, not only to the police officers, but also to the patrons at the event. At the motion hearing, Assistant District Attorney Will indicated that the basis of the State's prosecution in this case was not merely due to Mr. Eggum's words, but also because of his failure to leave the tent when officers were attempting to evacuate it. (Motion Transcript, 17:5-9). Mr. Eggum was argumentative, and told officers he was not going to leave the area. (Jury Trial Transcript, 95:15-25, 96:4-10, 98:24-25, 99:1-2). Chief

Gaglione spoke to Mr. Eggum for about six minutes, again requesting he evacuate the tent, and he still refused to leave. (Jury Trial Transcript, 96:23-25). Mr. Eggum then became more agitated, and "got into" Chief Gaglione's face. (Jury Trial Transcript, 97:14-17). Mr. Eggum then pointed and stuck his finger in Chief Gaglione's chest. *Id.* These actions occurred after the Chief had spent about six minutes trying to convince Mr. Eggum to leave voluntarily, and after the Chief had listened to Mr. Eggum repeatedly refuse to leave, use profanity, and indicate that he was going to sleep in the tent. (Jury Trial Transcript, 98:23-25, 99:1-3). Mr. Eggum was purposefully causing a commotion, and the attention of patrons and organizers were focused on his disruptive actions. (Jury Trial Transcript, 103:8-10). Chief Gaglione indicated that "the disorderly conduct was evident on how loud he was getting, boisterous." (Jury Trial Transcript, 103:7-8). The disruptiveness of Mr. Eggum's actions reached a level so great that the Chief had Mr. Eggum arrested, which diverted the attention of officers who were attempting to make sure patrons left the event in a safe manner. (Jury Trial Transcript, 102:18-25, 103:1-2).

The record established at Mr. Eggum's jury trial was clear. Mr. Eggum was not arrested due to only his words like Mr. Eggum argues on appeal. Rather, his conduct of repeatedly refusing to leave and physical contact with the arresting officers were taken into account when arresting

Mr. Eggum. The trial court indicated, in a motion hearing on December 18, 2015, that if Mr. Eggum had "voiced his opposition alone . . . this Court could readily state that he was punished for exercising his right to speak out against the government." (Motion Transcript, 21:6-9). However, the State argues on appeal, and the trial court affirmed, that was not the case here. The trial court concluded that the evidence taken in its totality, including Mr. Eggum's refusal to leave, his contact with officers, and impediment of the officer's duties, was not protected by the First Amendment. (Motion Transcript, 21:15-21, 22:4-14). The State requests this Court affirm the trial court's decision and find that Mr. Eggum's conduct fell within the Wisconsin Disorderly Conduct statute, and given the totality of the circumstances, is not protected by under the First Amendment.

II. THE JURY WAS PROPERLY INSTRUCTED ON THE WISCONSIN DISORDERLY CONDUCT STATUTE.

The judge's discretion to allow use of the negotiated jury instruction for "Disorderly Conduct" at Mr. Eggum's jury trial was not erroneous. This case was subsequently tried before a jury on February 2, 2016. The statutory definition of "Disorderly Conduct" commonly used in Wisconsin Courts to instruct the jury is found in Wisconsin Jury Instructions-Criminal 1900. It reads, "Disorderly conduct, as defined in § 947.01 of the Criminal Code of Wisconsin, is committed by a person who, in a public or private place, engages in violent, abusive, indecent, profane, boisterous,

unreasonably loud, or otherwise disorderly conduct under circumstances in which such conduct tends to cause or provoke a disturbance." See Wis JI-Criminal 1900 (2016).

Wisconsin judges are afforded wide discretion in issuing jury instructions, extending to both choice of language and emphasis. *State v. Vick*, 104 Wis.2d 678, 691, 312 N.W.2d 489, 495 (1981). In this case, while addressing the jury instruction language, the State and Defense agreed to remove the language of "violent, abusive, indecent, profane, boisterous, and unreasonably loud" from the instructions, which was allowed by the trial court. (Jury Trial Transcript, 231:10-22). The remaining definition of disorderly conduct, which was submitted to the jury, described an individual "who, in a public or private place, engages in violent, abusive, or otherwise disorderly conduct under circumstances which tends to cause or provoke a disturbance," in accordance with the remainder of the Wisconsin Jury Instruction definition. The Court did not instruct the jury on proposed instructions which would have included definitions of an actions that would constitute a "true threat." (Jury Trial Transcript, 234:23-25, 235:1-11). However, the Court was under no obligation to do so, as it has wide discretion in issuing instructions to a jury.

The defense attorney, Attorney Bloch, was free to argue for First Amendment implications at trial. (Jury Trial Transcript, 235:12-15). Even if

Attorney Bloch did not believe First Amendment law as it relates to the Wisconsin Disorderly Conduct law is sufficiently addressed in the Wisconsin jury instruction for disorderly conduct, he was not barred from addressing this issue with the jury and instructing the jury through his own argument at trial. Thus, Mr. Eggum's argument – that without general knowledge or a jury instruction on the First Amendment it was impossible for the jury to understand the First Amendment – is mistaken.

III. MR. EGGUM RECEIVED A FAIR AND IMPARTIAL TRIAL.

A. Mr. Eggum's Haircut Did Not Prejudice His Right to a Fair Trial.

Courts are sensitive to the physical appearance of a defendant in front of a jury, and how that may influence the rendering of a verdict. For instance, the United States Supreme Court has held that "an accused should not be compelled to go to trial in prison or jail clothing because of the possible impairment of the presumption so basic to the adversary system." *Estelle v. Williams*, 425 U.S. 501, 504, 96 S. Ct. 1691, 1693, 48 L.Ed.2d 126, 130-31 (1976). The Supreme Court's reasoning behind this strict rule is that the defendant's jail clothing is so likely to be a continuing influence throughout the trial that an unacceptable risk of the jury taking into account impermissible factors is presented. *Id.* at 505.

Mr. Eggum's argument does not relate to jail clothing, but instead with the appearance of Mr. Eggum's haircut. Mr. Eggum, on appeal, likens the prejudice he may have received from the unkempt nature of his hair to the level of prejudice one may suffer from appearing in jail clothing or shackles in front of a jury. The overstates and overextends the logic that the Supreme Court applied in cases such as *Estelle*.

In *Estelle,* the defendant was forced to wear jail clothing and shackles during proceedings in front of a jury. *Id.* The Court took issue with this, because it could possibly impair the presumption of the defendant's innocence, which is a presumption "so basic to the adversary system" and must be protected. *Id.* at 504. The length of Mr. Eggum's hair does not, in any way, compare to the prejudice of jail clothing or the appearance of shackles may inflict on his presumption of innocence. Hair length does not suggest whether a defendant is guilty or not guilty of a criminal law violation, which jail clothing or shackles may suggest. To extend the logic of the Court in *Estelle,* that the appearance of Mr. Eggum's hair may risk his presumption of innocence, is inaccurate. At trial, Mr. Eggum's appearance in no way suggested guilt, or affected the "dignity and decorum of judicial proceedings that the judge is seeking to uphold." See *Deck v. Missouri,* 544 U.S. 622, 624, 125 S. Ct. 2007, 2009, 161 L.Ed.2d 953, 959, 18 Fla. L. Weekly Fed. S. 295 (2005).

Here, the appearance of Mr. Eggum's hair was noted in the record to be nothing out of the ordinary. Specifically, the Court noted that "there doesn't seem to be any problem or anything inappropriate about your hair at this time." (Jury Trial Transcript, 7:11-12). The Court continued forward, noting that Mr. Eggum's hair was "not wild. It's not thrown about in disarray or anything like that. It's a decent head of hair." (Jury Trial Transcript, 7:17-18). The Court had pictures of Mr. Eggum's hair taken in case this issue was brought again, as it is now on appeal. (Jury Trial Transcript, 15:22-23; See attached photography of Mr. Eggum's Hair). Most importantly, the Court noted that there was nothing about Mr. Eggum's hair "that would in any way, in [the Court's] estimation, affect the jurors." (Jury Trial Transcript, 7:13-14).

Mr. Eggum was ordered to dress in civilian clothes before he was allowed to be seen in front of the jury. The Court indicated that it "didn't want [Mr. Eggum] in any kind of chains or restraints that are visible to the public." (Jury Trial Transcript, 7:1-6). The Court did "everything [it could] to make sure [Mr. Eggum's] trial [was] as fair as possible, including making sure [Mr. Eggum was] dressed appropriately so that there [wasn't] any suggestion that Keith Eggum [was] bad or [was] in jail." (Jury Trial Transcript, 9:8-11). The Court was properly sensitive of the prejudice that Mr. Eggum dressed in jail clothing may incite, and spoke to its concerns on

its record. The Court, while sensitive of the risk of prejudice a person's appearance may incite, reasonably decided Mr. Eggum's haircut did not prejudice Mr. Eggum's presumption of innocence. The State requests this Court affirm the trial court's decision and find that Mr. Eggum's haircut did not prejudice his right to a fair trial.

B. The Presence of Additional Deputies in the Courtroom Was Not Improper, and Did Not Prejudice Mr. Eggum's Right to a Fair Trial.

The additional police presence at Mr. Eggum's jury trial was not improper, as it was to ensure the safety of the courtroom, and it did not prejudice Mr. Eggum's right to a fair trial. Wisconsin courts have held that criminal defendant should not be restrained in view of jurors during a jury trial, as it may "prejudice in the minds of jurors when they view a man presumed to be innocent in the chains of the convicted." *State v. Ziegler*, 2012 WI 73, ¶84, 342 Wis. 2d 256, 296, 816 N.W.2d 238, 258. However, both Federal and Wisconsin state courts have consistently held that this rule is not absolute. Courts have implemented a balancing test, where the rights of the accused must be balanced against the safety of the public. *State v. Cassel*, 48 Wis. 2d 619, 624, 180 N.W.2d 607 (1970).

In *United States v. Nicholson*, a defendant appealed from his conviction on grounds of equal protection and due process violations, as

there were plainclothes police officers in close proximity to him at his jury trial. *United States v. Nicholson*, 846 F.2d 277, 279 (5th Cir. 1988). In that case, the Circuit Court had ordered the deputies to be present due to the dangerousness and unpredictability of the defendant. *Id.* The Court of Appeals for the Fifth Circuit balanced the interests of the court's obligation to protect the court and its processes, and its obligation to attend to the safety and security of those in the courtroom. *Id.* Balancing those interests, the court found that the officers' presence was warranted based on the defendant's violent criminal history which necessitated additional police present in the courtroom. *Id.* at 279.

The United States Supreme Court and Wisconsin courts have also employed this balancing test. The Court has held that additional show of force, as much as the shackling of a defendant at trial, is not prejudicial when the safety of the courtroom outweighs the prejudice to the defendant. See *Illinois v. Allen*, 397 U.S. 337, 344, 90 S. Ct. 1057, 1061, 25 L.Ed.2d 353, 359 (1970). See also *Cassel* at 624; *State v. Grinder*, 190 Wis. 2d 541, 527 N.W.2d 326, 330 (1995).

In this case, the show of force against Mr. Eggum was not unusual or prejudicial to his right to a fair trial. Nothing in the record indicates that he was physically placed in restraints that could be seen by the jury, or that he was restrained at all. There was also no indication of increased police

proximity to the defendant as stated in the record. There may have been a significant police presence in the courtroom at the time of this trial. (Jury Trial Transcript, 16:19-24). However, significant police presence is allowed under Wisconsin law to protect the safety of the courtroom. Wisconsin trial courts have broad authority to determine what force is 'necessary to maintain order, decorum, and safety in the courtroom." *State v. Ziegler*, 2012 WI 73, ¶84, 342 Wis. 2d 256, 816 N.W.2d 238; *Flowers v. State*, 43 Wis. 2d 352, 362, 168 N.W.2d 843 (1969); see also *State v. Champlain*, 2008 WI App 5, ¶22, 307 Wis. 2d 232, 744 N.W.2d 889. *State v. Miller*, 2011 WI App 34, ¶5, 331 Wis. 2d 732, 735, 797 N.W.2d 528, 529-30.

On the day of Mr. Eggum's jury trial, the extra deputies were ordered to be "as un-intrusive as possible." (Jury Trial Transcript, 16:23-24). There is nothing in the record that suggests an additional or unusual amount of force was displayed in front of the jury. Even if there may have been additional officers in the courtroom, Mr. Eggum's erratic and unruly behavior made the additional officers necessary to ensure the courtroom remained safe. The trial court noted that the additional officers were there partially for "security issues that [the court] made reference to earlier." (Jury Trial Transcript, 16:20-23). The security was therefore necessary for protection of the public, and outweighs any minor prejudicial effect that it may had had on the defendant.

Mr. Eggum, on appeal, agrees that this greater show of force is lawful, yet objects to the greater police presence in this case because "recent studies" allegedly show that juries consider far more than just the facts presented to them. Although this may be true, Mr. Eggum does not cite to relevant, binding case law which would support his argument. Therefore, the State requests this Court find that Mr. Eggum was not prejudiced by the additional police presence in the courtroom at his trial.

CONCLUSION

For all the foregoing reasons, the State respectfully requests that this Court affirm the circuit court's judgment of conviction.

Dated this 8th day of February, 2017.

Respectfully,

s/ Kristina J. Gordon
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CERTIFICATION OF BRIEF

I hereby certify that this document conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c), for a brief and appendix produced with proportional font. The length of this brief is 3,319 words long.

Dated this 8th day of February, 2017.

/s Kristina J. Gordon
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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 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 certification has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 8th day of February, 2017.

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