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 REPLY 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
STATE BAR NO. 1091201
COUNSEL FOR
DEFENDANT-APPELLANT

675 North Brookfield Road
Brookfield, WI 53045
(262) 784-7110

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ARGUMENT

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

The State again alleges that Eggum was charged with disorderly conduct because of contact with Chief Gaglione. However, this assertion is contradicted by Chief Gaglione's statements. [R.93:103]. Eggum was arrested for being loud and boisterous in the beer and music tent, at an event known for being loud.

Eggum was not arrested for loitering or trespass, but instead, for his verbal refusals to leave. [Response Br. 8]. 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].

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].

To be convicted for violating the disorderly conduct statute, the State must ensure that the defendant was 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).

Eggum vehemently objects to the State's violation of his rights. This arrest resulted in two additional charges in this case. One charge was later dismissed, and the other charge Eggum was acquitted of at trial. Further, this arrest resulted in Eggum being tazed while seated in the back of a Big Bend police cruiser.

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

fighting words based upon the audience, and the comments were not a true threat because there was no unlawful threat of violence. *See Virginia v. Black*, 538 U.S. 343, 359-360, 123 S.Ct. 1536, 155 L.Ed.2d 535, 552 (2003) *see also City of Houston v. Hill*, 482 U.S. 451, 107 S.Ct. 2502, 2509-2510, 96 L.Ed.2d 398 (1987).

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.

II. 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].

The State response to this argument by asserting that the jury instruction was fine, and trial counsel could have argued the first amendment constructional issues to the jury. This does not

conform with case law, which asserts "**the State must ensure** that defendants are convicted under the statute as it is subsequently construed . . ." *Osborne v. Ohio*, 495 U.S. 103, 118, 110 S.Ct. 1691 (1990)(emphases added).

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*.

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.

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

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.92:4, R.93:7-10, 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.]

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. . ." *Deck v. Missouri*, 544 U.S. 622, 631 (2005). 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].

Eggum contends that allowing him to appear disheveled in court impeded his right to a fair trial.

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.

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 14th day of FEBRUARY, 2017.

Respectfully submitted:

ATTORNEY FOR APPELLANT

s/ NOLAN A. JENSEN

Nolan A. Jensen
Attorney for Defendant-Appellant
State Bar No. 1091201

PREPARED BY:
KAY & KAY LAW FIRM
675 N. Brookfield Road
Brookfield, WI 53045
(262) 784-7110

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 960 words.

Signed:

s/ NOLAN A. JENSEN

Nolan A. Jensen
Attorney for Defendant-Appellant
State Bar No. 1091201

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 14th day of FEBRUARY, 2017.

ATTORNEY FOR APPELLANT

s/ NOLAN A. JENSEN

Nolan A. Jensen
Attorney for Defendant-Appellant
State Bar No. 1091201

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 **FEBRUARY 14, 2017**. I further certify that th brief and appendix was correctly addressed and postage was pre-paid.

Signed:

s/ NOLAN A. JENSEN

Nolan A. Jensen
Attorney for Defendant-Appellant
State Bar No. 1091201