STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

CASE NOS. 2017AP000958, 000959, 000960, and 000961CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

BRIAN A. BARWICK,

Defendant-Appellant.

Appeal From Decision and Final Order Denying Post-Conviction Motions Entered May 8, 2017,
Milwaukee County Circuit Court Judge Michelle A. Havas, Presiding

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REPLY BRIEF
DEFENDANT-APPELLANT

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ARGUMENT

I. THE EVIDENCE WAS INSUFFICIENT TO PROVE THAT THE YAHOO EMAIL RECEIVED BY K.D. WAS LEGALLY OBSCENE OR PROFANE.

The State's response argument requires that this Court decide whether Exhibit 11's epithet-laced rant, that protested K.D.'s performance of his guardian ad litem duties, meets a *legal* definition, if any exists under Wis. Stat. § 947.125 (2)(c), for obscenity or profanity.

Insufficient evidence that email was "obscene." Barwick was sentenced for a crime that the State, at trial and now in its appeal brief, cannot define. To avoid a concession to that point, the State cites *People v. Kucharski*, 987 N.E.2d 906 (Ill. App. Ct. 2013), which says that an "ordinary dictionary definition" for "obscene" should suffice (although, interestingly, the Court never declares just what that definition is.)

The *Kucharski* approach is not supported by Wisconsin's own rules of statutory construction. Words that do not have common and "approved" usage cannot be

properly defined by resort to a dictionary because Wis. Stat. §990.01(1) mandates that "words and phrases . . . *that have a peculiar meaning in the law* shall be construed according to such meaning" and not by resort to a dictionary. (Emphasis added.) The terms "obscene" and "profane" probably are among the least commonly agreed upon terms in the law. To the extent any meaning can be said to be common or "approved," only the *Miller* definition for "obscene" continues to be approved. That's why Barwick concluded that there was absolutely no evidence in the record that Exhibit 11 appealed to a prurient interest, was patently offensive because it exceeds contemporary community standards, and as a whole lacked any literary, artistic, political or scientific value.

The State failed to explain how Exhibit 11 fell within any dictionary definition because there is no way to determine, out of the myriad dictionary definitions, just which one applies. Online versions of the Oxford, English, Merriam-Webster, Cambridge, and Macmillan dictionaries (last accessed on March 24, 2018) provide at least fifteen different meanings, including "abhorrent to morality or virtue," or

"language regarded as taboo in polite usage," or as "so excessive to be offensive" or "so unfair or immoral that you feel angry." None of these meanings has been offered by the State as the common and "approved" meaning in Wisconsin, but, according to Wis. Stat. §990.01(1), that is a precondition to an adoption of that meaning here.

Numerous courts now have reached the conclusion that the F-word rarely is abhorrent to the average listener. One could start with the United States Supreme Court's treatment of public, courthouse display of "Fuck the Draft" on a jacket worn by the defendant in *Cohen v. California*, 403 U.S. 15, 26 (1971), which cautioned courts not to ignore the "emotive function which, practically speaking may often be the more important element of the overall message sought to be communicated. Exhibit 11 obviously carried both that emotive function, and expression of dissatisfaction with K.D.'s performance as a court officer, and it used words that can no longer be described with confidence as legally "obscene." As guardian ad litem, K.D. was not provoked into a combative response. *City of Houston v. Hill*, 482 U.S. 451,

462-63 (1987), found that vulgarities that often accompany protests should be excused from prosecution: "The freedom of individuals verbally to oppose or challenge police [or court officer] action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state."

Lastly, aside from the *Barson* case cited in Barwick's Opening Brief, the courts have found the invectives similar to those sent to K.D. not to be obscene, using various definitions of "obscene:": *People v. Powers*, 122 Cal. Rptr, 3d 709, 193 Cal. App. 4th 158 (2011) (use of the words "fuckin bullshit," "fuckin trash," fuckin slut," and "fuckin assholes" were non-obscene "annoying rants" and "vulgarities" about customer service); *Lofgren v. Commonwealth*, 55 Va. App. 116, 684 S.E.2d 233 (2009) (use of phrases "fucking cunt" and "fucking bitch" were not obscene in the context of a disgruntled lover's relationship with his girlfriend); and *United States v. Landam*, 251 F.3d 10-72, 1087 (6th Cir. 2001) (use of the term "cuntless fuck" by husband towards his wife was an vulgar invective but not obscene).

Insufficient evidence that email was "profane." The State also claims (Response Brief at 16) that this Court can sustain Barwick's conviction because the email to K.D. was profane. The State urges this Court to use some unspecified profanity test involving a "common understanding of the English language" and while pointing to *State v. Breitzman*, 904 N.W.2d 93, 378 Wis.2d 431, 2017 WI 100 (2017*)*.

But *Breitzman* expressly declined to define what "profane" speech is and whether the words in that case (such as calling the victim a "fuck face" and "piece of shit") fell within an approved legal definition: "We reserve full analysis of what constitutes profane speech and whether profane speech is otherwise protected as free speech for another day." 2017 WI 100, ¶ 5, 378 Wis.2d 431, 438–39.

The most glaring void in the State's Response Brief is its failure to address Barwick's legal and factual point (Opening Brief at 22) that Exhibit 11 was not proven to be "profane" because it was not religiously irreverent. Aside from the relevant case (*Duncan*) which Barwick cited, other courts have used a similar definition of "profane." See, *State*

v. Authelet, 120 R.I. 42, 385 A.2d 642, 644 (1978); *Baker v. State*, 494 P.2d 68, 71, 16 Ariz.App. 463, 466 (1972); *Gagliardo v. United States,* 366 F.2d 720, 725 (9th Cir.1966).[1]

II. THE STATE FAILED TO PROVE THAT THE APPEARANCE BOND PROHIBITED USE OF A COMPUTER.

Barwick's appearance bond document failed to include a no-computer-use provision, and the clear words of the bail jumping statute, Wis. Stat. §946.49, as Barwick noted in his Opening Brief at 24-28, require that his conviction be supported by evidence that the written "terms" of the appearance bond were violated.

The State's neglected to acknowledge this Court's decisive ruling in *State v. Dawson*, 195 Wis.2d 161, 170, 536 N.W.2d 119, 122 (Ct. App. 1995), where the State made a similar argument. The Court instead decided that statutory

[1] If Barwick's conviction under Wis. Stat. § 947.125 (2)(c) is voided, he submits that the inflammatory email evidence that was received would add another ground for severance, in addition to those he previously raised, which he now reasserts. See, *State v. McGuire*, 204 Wis. 2d 372, 379-85, 556 N.W. 2d 111 (Ct. App. 1996) (discussing how "retroactive misjoinder" ties to evidentiary "prejudicial spillover.")

conditions of release, if not incorporated into a written appearance bond, are not equivalent to the "terms" of a bond described at the bail jumping statute:

> The language of § 946.49(1), Stats., is unambiguous: defendants can only be convicted of bail jumping under this subsection if they "intentionally fail [ ] to comply with the terms of [their] bond."
>
> Section 967.02(4), Stats., defines "bond" as "an undertaking either secured or unsecured entered into by a person in custody by which the person binds himself or herself to comply with such conditions as are set forth therein.[2]

III. THE PENALTY ENHANCERS IN CASE NOS. 15CF1521 AND 15CF3082 WERE INVALID.

The State argues (Response Brief at 21-22) that Barwick's conduct was covered by the domestic abuse repeater statute because the proof showed that he had typed text into three emails and had sent the emails, so that such conduct fell within the "physical act" terminology in Wis. Stat. § 968.075(1)(a)4.

[2] The same "prejudicial spillover effect" from the emails and seized evidence of Barwick's sexual fetish practices evidence that was submitted on the bail jumping counts would again raise a "retroactive misjoinder" issue.

In its February 28, 2018 submission, the State attached *State v. Egerson*, 2018 WL 1092163 (Ct. App., Feb. 27, 2018), for the proposition that a telephone call is a § 968.075(1)(a)4 "physical act" and that (according by *Egerson*'s reference to another non-precedential opinion in *State v Bandy,* Nos. 2014AP1005-CR and 2014AP1056-CR) a text communication is too. It is respectfully submitted that the terse, non-precedential rulings in *Egerson* and *Bandy* were wrong.

Bandy does not even discuss why text messages would constitute a "physical act." *Egerson,* in a brief explanation *at* ¶38, equates "using a material thing (phone) to communicate (an act) with a person" with the statutory element of "physical act." It appears, under this reasoning, that by using a *physical* object to communicate, what otherwise would not be a punishable form of conduct (that is, by a communication that does not involve the use of a device) is converted into the requisite "physical act."

Legislative history. § 968.075 was created by 1987 Wisconsin Act 346, and 1989 Wisconsin Act 293 amended

the law. Wis. Stat. § 968.075(1)(a)4, in its original form, not only applied to a "physical act" but also to "a threat in conjunction with a physical act" (which is what the State accused Barwick of doing). But 1989 Wisconsin Act 293 deleted that latter conduct from the subdivision. The form of communicative conduct which *Egerson* and *Bandy* condemned for enhanced punishment is no longer covered by the statute. The State's attempt to amend the statute to favor the prosecution's preferred version should be rejected. See, *State v. Martin*, 470 N.W.2d 900, 909–10, 162 Wis.2d 883, 907 (1991).

Context. Subdivision 4 is immediately preceded by three other definitions of "domestic abuse" conduct. Each of other definitions of domestic abuse necessarily involves physical contact inflicting physical pain, physical injury or illness, impairing a physical condition, or committing a sexual assault. There is no suggestion in the statute that the fourth form of "domestic abuse" was meant to depart from the three preceding forms of conduct that involve physical contact. See, *State v. Johnson*, 491 N.W.2d 110, 112–13, 171

Wis.2d 175, 181–82 (Ct. App.1992) (discussing *noscitur a sociis*). Moreover, the legislature has shown that it has chosen not to broaden subdivision 4 because it covered certain device-assisted communications in another anti-harassment statute, § 947.0125, which refers to communication by "computerized communication system." See, *State v. McKellips*, 881 N.W.2d 258, 270, 369 Wis.2d 437, 464 (2016).

Other Wisconsin decisions. The State here and the Court in *Egerson* and *Bandy*, offered no explanation as to why *In re Douglas D.*, 626 N.W.2d 725, 735–36, 243 Wis.2d 204, 223–24, 2001 WI 47, ¶ 22 should not have been consulted, which differentiated communicative acts ("speech") from "physical acts" in regard to our disorderly conduct statute. The same dichotomy appears in *In the Interest of A.S.*, 2001 WI 48, 243 Wis.2d 173, 626 N.W.2d 712; *Teske v. State*, 256 Wis. 440, 444, 41 N.W.2d 642 (1950).

Lastly, the State is incorrect (Response Brief at 19-20) when it claims that an invalidation of the domestic abuse

sentencing enhancer relating to Count 1 (Stalking) in Case No. 15CF3082 would have "no bearing" on Barwick's sentence. A sentencing court may "ease a sentence already commuted. . ." and "may produce a lighter sentence than the maximum for the underlying offense." *State v. Holloway*, 551 N.W.2d 841, 844–45, 202 Wis.2d 694, 701 (Ct. App. 1996).

IV. THE YAHOO AND AOL SEARCH WARRANTS WERE DEFECTIVE AND TRIAL COUNSEL WAS INEFFECTIVE BY NOT SEEKING TO SUPPRESS THE EVIDENCE OBTAINED FROM THOSE WARRANTS.[3]

Barwick's Opening Brief at 17 cited the record at R.31, pp. 25-37 for his argument that warrant-issuing magistrates cannot base their probable cause findings on mere conclusory opinions by police officers. See, *Giordenello v. United States*, 357 U.S. 480, 486 (1958) ("[Magistrate]

[3]Barwick now advises the Court that he wishes to withdraw his jurisdictional defect arguments (Opening Brief at 33-34) directed to the Yahoo, Google, Facebook, and AOL warrants. On the other hand, Barwick reasserts that trial counsel was ineffective for not raising jury instruction, inadmissible evidence, and severance objections which this reply brief and his opening brief have noted. Also, he asserts that counsel's ineffectiveness as to any one of the multiple counts that were tried, requires reversal to all counts. See, *State v. Sholar*, 900 N.W.2d 872 (Table), 2017 WI App 503, 77 Wis.2d 337), *review granted*, 378 Wis.2d 222. (Oct. 17, 2017).

should not accept without question the complainant's mere conclusion that the person whose arrest is sought has committed a crime."); *Lee Art Theatre, Inc. v. Virginia*, 392 U.S. 636, 637 (1968) (affidavit just with police officer's opinion that movies were obscene was insufficient). The Yahoo search warrant was issued based solely on Officer Fohr's conclusory opinion that the email sent to K.D. was legally "profane." Because the law is settled on this issue, trial counsel was ineffective.

The AOL warrant, aimed at investigating a bail jumping offense, also was defective and trial counsel was ineffective for failing to challenge the warrant based on the settled law in *State v. Dawson*, 195 Wis.2d 161, 170, 536 N.W.2d 119, 122 (Ct. App. 1995), which decided that bail jumping is committed only if a written bond term is violated.

Trial counsel's neglect of these issues led to the collection of ISP address data that tied Barwick to the Yahoo-based obscene computer message in Case No. 14CM 4275 and to the AOL-based emails in Case No. 15Cf 4127. Hence, both lines of evidence were critical pieces of proof for the

prosecution, that clearly were prejudicial to Barwick, and so the warrant results did not lead to harmless error.

V. THE PROSECUTION FAILED TO PROVE THAT ITEMS SEIZED FROM BARWICK'S RESIDENCE WERE IMMEDIATELY RECOGNIZED AS INCRIMINATING EVIDENCE.

The search warrant to enter Barwick's residence stated that the "target of this search is any computer, and or any device capable of accessing the internet." The warrant also included "[i]tems that would tend to show dominion and control of the property searched, to include utility bills, telephone bills, correspondence, rental agreements and other identification documents."

Barwick contended, while citing case authority (Opening Brief at 34-36), that the warrant set the limits on what could be seized and that the seizure of 23 pairs of soiled panties and pubic hair trimmings that related to Barwick's apparent sexual fetish practices, clearly did not fall within those limits. The trial prosecutor said that the facts presented a plain view issue: "[A]s long as officers have a valid search warrant, are lawfully in a premises, in a room, and [are]

lawfully searching locations and areas and items that could contain the items enumerated in the search warrant, . . . any additional evidence that may be seen in *plain view* during those searches that constitutes evidence of a crime . . . .” (R. 50 at 16). (Emphasis added.)

What is missing, in those remarks and in the State’s appeal argument, is that the prosecution bears the burden of showing that a valid “plain view” seizure was conducted in which it was *immediately apparent* to the seizing officer, without necessitating further interaction with an item, that the item constituted evidence of a crime. A*rizona v. Hicks*, 480 U.S. 321, 325 (1987) noted that because the officer moved stolen stereo equipment to inspect for serial numbers, the “plain view” exception did not apply: “[T]he distinction between looking at a suspicious object in plain view and moving it even a few inches is much more than trivial for purposes of the Fourth Amendment.” See also, *United States v. Garcia*, 496 F. 3d 495, 510 (6th Cir. 2007) (holding that a document is not within the plain view exception if it must be read in order for its incriminating nature to be determined).

The prosecution needed to prove that the panties did not have to be moved to detect their relevance (*i.e*., either due to a soiled or odiferous state); that the letter's contents were not read prior to its seizure to discover its evidentiary value; and that the incriminating nature of the folded paper was apparent without even opening the baggie or unfolding the paper. The prosecution did not, however, present testimony before or at trial as how the items were first noticed and handled prior to seizure. See, *United States v. Longmire*, 761 F.2d 411, 417 (7th Cir.1985.

VI. BARWICK WAS DENIED HIS CONSTITUTIONAL RIGHT TO TESTIFY IN HIS OWN DEFENSE ABOUT THE SPOOFING THAT HE HAD OBSERVED THAT COULD HAVE EXPLAINED THE AOL.COM EMAILS TIED TO HIS BAIL JUMPING CONVICTIONS.

Before trial, trial counsel stated that Barwick would testify that the emails at issue could have been generated by "spoofing"[4] because Barwick had observed activity on his computer screen during times relevant to the charges against

[4] A helpful description of "spoofing" appears in *Sisson v. State*, 903 A.2d 288 (Del. 2006) at footnote 32.

him that appeared to be generated from outside sources. Nonetheless, the trial court excluded his testimony reasoning that it would have been irrelevant and it would have invited the jury to speculate. The State now argues that appellate counsel cannot challenge the court's discretionary, evidentiary ruling (Response Brief at 33) by having focused solely on the constitutional issue. But Barwick expressly argued here that Barwick had been barred from presenting relevant evidence, "arbitrarily." (Opening Brief at 38).

The trial court did abuse its discretion. See, *United States v. Hanover*, 2011 WL 13142591 (C.D. Cal. 2011), where the prosecution similarly sought to exclude evidence that the defendant was a victim of spoofing but the court decided to allow the defense to be raised:

> The Government's argument that Defendant has not identified the caller and contents of the calls, or established that the calls were, in fact, spoofed, is essentially an objection that Defendant's evidence is too speculative to be presented to the fact-finder. But this Court is not free to "dismiss logically relevant evidence as speculative."

CONCLUSION

Accordingly, appellant Barwick respectfully requests that the decision and order of the circuit court be reversed.

Dated this 26th day of March 2018.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 2,941 words.

Dated this 26th day of March 2018.

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CERTIFICATE 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 § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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.

Dated this 26th day of March 2018.

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