STATE OF WISCONSIN
COURT OF APPEALS District 2

STATE OF WISCONSIN,
Plaintiff - Respondent

-vs-

Appeal Court No. 2017AP1932
Circuit Court No. 2014CM2085

JAMES C. FAUSTMANN,
Defendant - Appellant

Review of Conviction from Trial Court on April 27, 2017
Racine Circuit Court Branch 9, Honorable Allan Torhorst

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STATEMENT ON PUBLICATION

This case should not be published because it will follow existing case law on applicability of lesser included offences.

STATEMENT ON ORAL ARGUMENT

Petitioners submit that this case does not require oral argument to fully enlighten the Court about the issues and relevant points should be fully appreciated from the briefing alone.

STATEMENT OF ISSUES

I. THE JURY SHOULD HAVE BEEN GIVEN AN INSTRUCTION ON THE LESSER INCLUDED OFFENSE OF DISORDERLY CONDUCT BECAUSE THE LESSER AND GREATER OFFENSES DIFFER ON INTENT ALONE AND A REASONABLE BASIS EXISTS FOR AN ACQUITTAL ON THE GREATER AND CONVICTION ON THE LESSER.

II. THE INCLUSION OF PENDING CHARGES FROM ANOTHER JURISDICTION AS OTHER ACTS EVIDENCE WAS AN ERRONEOUS EXERCISE OF DISCRETION BY THE DISTRICT COURT THAT WAS UNFAIRLY PREJUDICIAL TO MR. FAUSTMANN.

STATEMENT OF THE CASE

Faustmann was charged with unlawful use of a computer by sending threats and obscenities to another through the computer and for bail jumping by using a computer and sending messages to Governor Scott Walker in violations of conditions of bail that he was on at

the time. The messages were sent through a computer at his apartment complex where the computer was in a common area available to multiple tenants and other individuals.

At the same time the subject case was tried, there were also similar charges pending in Milwaukee County, where comparable computer messages were sent to Attorney Frank Gimball and Charles Sykes. The facts in the pending Milwaukee case of engaging in use of a computer to send inappropriate messages had not been proven at the time of the subject matter trial in the case at bar.

Prior to the trial, the Defendant brought a Motion in Limine to exclude the use of any alleged e-mail or other communications in the Milwaukee case to Frank Gimball and/or Charles Sykes since these were just unsupported allegations and had not been proven. The trial court denied his request.

After the evidence had been presented, the Defendant asked the Court for a jury instruction to include Disorderly Conduct as a lesser included offense, based upon the fact that the conduct as alleged fit all of the necessary criteria of a Disorderly Conduct. The Court denied the request and the Defendant was found guilty of all the charges as originally plead.

The Defendant now appeals.

SUMMARY OF THE ARGUMENTS

This Court is now being requested to grant the Defendant relief from the trial verdict, finding that the Trial Court errored by allowing unsupported alleged electronic communications that occurred in Milwaukee County to be used as conclusive evidence in the Trial Court case, because use of the same was unfairly prejudicial to Faustmann.

With the determination of the accuracy of the alleged conduct in Milwaukee County still pending at the time of trial, the risk of unfair prejudice to the Defendant, based upon its admission, far outweighs the probative value of its admission at the trial.

While other acts are generally inadmissible at trial, the Court still used a three-pronged framework to assess whether such evidence should be allowed at trial, and errored in finding that the three elements under *State v. Sullivan* were satisfied. During closing arguments, the State even argued that Faustmann had committed the crime at issue because of the supposed similarities between the two crimes, despite the fact that Faustmann had not been convicted of any crime in Milwaukee County at that time, demonstrating an unfair conclusion and representation to the jury based upon the Court's allowing the conduct as alleged in Milwaukee County to come into evidence.

Further, the Trial Court failed to take any steps such as cautionary Jury Instructions, to limit the unfair prejudice resulting from the admission of unsupported computer evidence from Milwaukee.

In effect, the Court allowed unsupported evidence of alleged criminal conduct from the Milwaukee County case to come into evidence to show conformity, causing the Defendant to be prejudiced because the information was highly unfair and prejudicial in nature, and caused the jury to draw a conclusion based upon propensity.

At the end of the case, the Defendant moved the Court to include Disorderly Conduct as a lesser included offense, which the Court denied. This left only the unlawful use of computerized communication systems available to the jury.

Since the elements of Disorderly Conduct can be satisfied and stand on their own as independent charges because there was testimony from Governor Walker's security staff that

they did not believe the threats to be genuine, where there would be an actual fear for safety. Therefore, the comments in and of themselves, if believed by the jury, could be considered Disorderly Conduct because they required different elements to prove than the use of a computer system.

For these reasons, the Court is asked to grant Faustmann's appeal, with directions to set the matter for a new trial.

ARGUMENT

I. THE JURY SHOULD HAVE BEEN GIVEN AN INSTRUCTION ON THE LESSER INCLUDED OFFENSE OF DISORDERLY CONDUCT BECAUSE THE LESSER AND GREATER OFFENSES DIFFER ON INTENT ALONE AND A REASONABLE BASIS EXISTS FOR AN ACQUITTAL ON THE GREATER AND CONVICTION ON THE LESSER.

This Court should find that the District Court abused its discretion in failing to grant an instruction for the lesser included offense of disorderly conduct, because a reasonable jury could acquit Mr. Faustmann on the greater offense of unlawful use of computerized communication systems and convict on the lesser offense of disorderly conduct. Because this failure by the District Court was an abuse of discretion, the District Court's decision should be reversed.

In determining whether a lesser included instruction should be granted, courts engage in a two-step inquiry. *State v. Muentner*, 138 Wis. 2d 374, 387, 406 N.W.2d 415, 421 (1987). First, the Court must decide whether the lesser included offense is, as a matter of law, a lesser included offense of the greater charge. *State v. Fitzgerald*, 2000 WI App 55, ¶8, 233 Wis. 2d 584, 608 N.W.2d 391. Given that such a determination is a matter of law, a district court's denial of a lesser included offense is reviewed de novo. *Id*. at ¶7. Second, the Court must determine whether there is reasonable evidential grounds for the defendant's acquittal on the greater offense and conviction on the lesser. *State v. Hawthorne*, 99 Wis. 2d 673, 682, 299 N.W.2d 866

(1981). The reasonableness of such evidence is viewed in a light most favorable to the defendant. *Fitzgerald,* 2000 WI App at ¶7. A trial court's failure to grant a request for a lesser included offense is erroneous when both elements of this test have been satisfied. *Muentner,* 138 Wis. at 385.

Given that Mr. Faustmann is able to satisfy both of these elements, the District Court's denial of his request for a lesser included instruction on disorderly conduct was an erroneous abuses of discretion and should be reversed by this Court.

a. Disorderly Conduct is a Lesser Included Offense of Unlawful Use of Computerized Communication Systems as a Matter of Law.

In reviewing a lower court's denial of a lesser included offense instruction, courts first must determine whether a lesser included offense exists for the charged crime as a matter of law. *State v. Moua,* 215 Wis. 2d 511, 517, 573 N.W.2d 202 (Ct. App. 1997). A lesser included offense does not need to be defined as such by statute in order for it to qualify as lesser included. Rather, in order for an offense to qualify as lesser included, all statutory elements of the lesser offense must be established in proving the greater offense without requiring proof of any additional element or fact. *Moua,* 215 Wis. 2d at 519; *see* Wis. Stat. § 939.66(1) (stating a lesser included offense may be "[a] crime which does not require proof of any fact in addition to those which must be proved for the crime charged.").

Courts have recognized that written speech can qualify as disorderly conduct regardless of whether an actual disturbance resulted. *State v. Schwebke,* 2002 WI 55, ¶32, 253 Wis. 2d 1, 644 N.W.2d 666. The Supreme Court of Wisconsin found in *Schwebke* that the defendant was in fact guilty of disorderly conduct after repeatedly sending anonymous mail to four individuals, upholding the district court's conviction. *Id*. at ¶39. While those mailings differ from those in

the present case as traditional paper mail rather than electronic, the function of the communication is no different and therefore should be treated the same as applied to the charge of disorderly conduct.

A differing element of intent between two otherwise similar statutes may warrant the finding that one is a lesser included offense of the other. *See Muentner*, 138 Wis. 2d at 386. In *Muentner*, the reviewing court found that the lesser and greater charges in question, while not identical in language, were similar enough in purpose to find as a matter of law that there was a lesser included offense. 138 Wis. 2d at 386. The court held that, because the key difference between the two statutes was this element of intent and the lesser offense required no additional proof of fact, § 939.66(1) was satisfied and the lesser included offense was justified. *Id*. Similarly, the two statutes at issue in the present matter are largely similar, with the key difference between the two being that Wis. Stat. § 947.0125(2)(a) contains an additional element of intent and that the harassing behavior was done electronically. Further, both statutes deal with abusive or otherwise disorderly behavior, although differing adjectives are used to describe that behavior to more or less the same effect.

At trial, the State argued and the District Court agreed that Wis. Stat. § 947.01(1) requires proof of the additional fact that the conduct in question tends to cause a disturbance at the time the act was committed. (R54 P. 147 L.9) Notwithstanding, the fact that the statute does not mention when this disturbance must have occurred like the District Court suggested, § 947.0125(2)(a) nonetheless requires a similar showing that the defendant engaged in similarly disruptive or disorderly behavior. Most importantly, both statutes list terms to describe the prohibited behavior and specifically include among them abusive conduct.

Wisconsin courts have defined abusive behavior as "conduct that, at least in part, is 'injurious, improper, hurtful, offensive, [or] reproachful.'" *State v. Douglas D.*, 2001 WI 47, ¶32, 243 Wis. 2d 204, 626 N.W.2d 725 (alteration in original; citing *Black's Law Dictionary 11* (6th ed. 1990)). Within the context of § 947.0125(2)(a), engaging in this type of abusive behavior would inevitably create the kind of disturbance that the State and District Court saw as distinguishing the two offenses. Given that § 947.01(1) applies to "otherwise disorderly conduct" that is not directly mentioned in the statute itself, and that both statutes contemplate abusive behavior, this provision could reasonably be construed to include behavior described under § 947.0125(2)(a) absent any proof of intent, thus requiring no additional proof of fact. Ultimately, while there is not total symmetry in the terms used by each statute to describe infringing behavior, § 947.01(1) is nonetheless a lesser included offense in this case given the absence of an element of intent in § 947.0125(2)(a) and the otherwise similarity between the two statutes.

Therefore, because additional facts beyond the charged offense would not be necessary to prove disorderly conduct, the District Court was erroneous in its finding that disorderly conduct is not a lesser included offense of unlawful use of a computerized communication system.

b. A reasonable basis exists for an acquittal on the greater offense and a conviction on the lesser offense.

Once a charge is found to be a lesser included offense as a matter of law, courts must then determine whether a jury could reasonably acquit on the greater charge while convicting on the lesser charge. *Muentner*, 138 Wis. 2d at 387. Courts are to weigh the evidence presented at trial and look at it in a light most favorable to the defendant. *Id.* If such an independent basis to acquit on the greater offense and convict on the lesser exists, a district court's failure to grant a lesser included instruction is erroneous. *Id* at 385.

Here, given the evidence introduced at trial, it would not be unreasonable for a jury to convict Mr. Faustmann on the lesser charge of disorderly conduct and acquit him on the greater charge of unlawful use of computerized communication systems. At trial, an investigator stated that, upon interviewing Mr. Faustmann, he did not deem certain claims made in the messages worthy of investigation, namely that Mr. Faustmann was indirectly responsible for 40-plus murders in Chicago. (R54, P107, L6). Viewing this evidence in a light most favorable to Mr. Faustmann, a reasonable jury could have found that his behavior was in fact abusive but amounted to vented frustration rather than any actual intent to abuse. This general frustration towards the recipient of these messages is demonstrated by Mr. Faustmann's statement to investigators for the Milwaukee case that "I told [the intended recipient] how I felt and that was that, and I got rid of that." (R54, P113, L8). In this light, Mr. Faustmann's behavior in sending the electronic message could reasonably be considered abusive towards its recipient. Similarly, its threatening nature could reasonably be considered otherwise disorderly conduct given that courts have found written messages to be disorderly conduct, as discussed above. As such, it would be possible for a jury to find that Mr. Faustmann lacked any intent to abuse or harass.

Ultimately, a jury could reasonably find that Mr. Faustmann sent the messages in question, and that they were abusive or otherwise harassing towards the intended recipient. However, given questions surrounding Mr. Faustmann's intent in sending the message, that same jury could find that his actions had not risen to the level prescribed by § 947.0125(2)(a) and amounted to mere empty words lacking any real intent. Therefore, it would not be unreasonable for a jury to find Mr. Faustmann guilty of the lesser offense of disorderly conduct based on a favorable view of the facts, while also acquitting him of the greater offense of unlawful use of computerized communication systems as lacking any intent to commit the described acts.

In sum, because disorderly conduct is a lesser included offense of unlawful use of computerized communication systems as a matter of law, and because a jury could reasonably acquit on the greater and convict on the lesser, the District Court's failure to issue a lesser included instruction amounts to an erroneous exercise of discretion.

II. THE INCLUSION OF PENDING CHARGES FROM ANOTHER JURISDICTION AS OTHER ACTS EVIDENCE WAS AN ERRONEOUS EXERCISE OF DISCRETION BY THE DISTRICT COURT THAT WAS UNFAIRLY PREJUDICIAL TO MR. FAUSTMANN.

The District Court also erroneously exercised its discretion in allowing evidence to be used against Mr. Faustmann from a pending case in a different court which was unfairly prejudicial and punitive in nature. Because the trial against Mr. Faustmann in Milwaukee court was still pending at the time it was used as evidence in the current case, the risk of unfair prejudice against Mr. Faustmann, based on its admission, far outweighs any probative value that may justify its inclusion at trial. Therefore, this Court should reverse the District Court's holding due to its erroneous exercise of discretion in admitting this evidence at trial.

While other acts evidence is generally inadmissible at trial, courts use a three-part framework to assess whether such evidence should be allowed. *State v. Sullivan*, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998). First, the evidence must be introduced for an acceptable purpose. *Id* at 772. Second, the evidence must relate to a fact or proposition of consequence to the proceeding and it must have a probative value. *Id*. Third, the probative value of the evidence must not be outweighed by other factors such as "the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence." *Id* at 772-73. The probative value of evidence directly relates to the relevance of the particular evidence, with one increasing along with the other. *State v. Payano*, 2009 WI 86, ¶87, 320 Wis. 2d 348, 768 N.W.2d 832. The State, as proponents of the

evidence in question, bears the burden of showing this framework has been satisfied. *Sullivan*, 216 Wis. 2d at 774. In the present case, assuming that the evidence at issue was introduced for an acceptable purpose, and that that evidence related to a fact of consequence and had probative value, its admission should still not have been allowed due to the overly punitive effect it had on Mr. Faustmann and therefore should have been excluded.

While Wis. Stat. § 904.04(2) allows other act evidence to be used to prove intent and identity, evidence that tends to prove these elements is not automatically admissible. *State v. Harris*, 123 Wis. 2d 231, 235, 365 N.W.2d 922 (Ct. App. 1985). Rather § 904.03 must also be satisfied, which specifically provides for the exclusion of evidence that is relevant when the probative value of that evidence is substantially outweighed by concerns of unfair prejudice. As the court in *Sullivan* stated, "[u]nfair prejudice results when the proffered evidence has a tendency to influence the outcome by improper means or . . . otherwise causes a jury to base its decision on something other than the established propositions in the case." *Sullivan*, 216 Wis. 2d at 789-90. This is a concern due to the fear that a jury will unfairly punish a defendant for being what they perceive as a bad person rather than based on the facts of the present case. *Id*, at 790.

Here, the other acts evidence had considerable potential to unfairly prejudice Mr. Faustmann in the eyes of the jury based on the pending nature of the charges advanced. In introducing this evidence, the jury was being asked to determine the guilt or innocence in this unrelated case as it weighed the relevance of such evidence. As the State admitted during its closing arguments, the other acts evidence was offered in part to prove that Mr. Faustmann had committed the crime at issue here because of supposed similarities between the two crimes, despite the fact that Mr. Faustmann was not convicted in connection with the Milwaukee County cases. If the jury believed Mr. Faustmann was guilty in this unrelated case for which he had yet

to be convicted, the effect would likely be to find the same result in the present case. The admission of this evidence unfairly painted Mr. Faustmann as a repeat offender despite the fact that he had yet to be convicted, resulting in prejudice that far outweighed any probative value the evidence of other acts offered. Additionally, the District Court failed to take any steps, such as a cautionary jury instruction, to attempt to limit the unfair prejudice resulting from the admission of this evidence. While this alone may not have eliminated the unfairly prejudicial effect of the other acts evidence, the absence of such an instruction meant that Mr. Faustmann would feel the full prejudicial effect caused by the admission of that evidence.

Because the District Court erroneously admitted the evidence of other acts, the State has the burden to establish that there is no reasonable possibility that this error contributed to Mr. Faustmann's conviction in the present case. *See Sullivan*, 216 Wis. 2d at 792-93. Here, the admission of the other acts evidence likely would have contributed to Mr. Faustmann's conviction due to the risk of a jury unfairly linking the two incidents together. The State's case in large part relied on the similarities between the two incidents, as it used the identical contact information associated with the messages in both cases to identify Mr. Faustmann. However, should Mr. Faustmann be found innocent in the Milwaukee case, that tie would be broken and the prejudicial effect of its inclusion as evidence is much more significant. Given the State's significant reliance on this other acts evidence, there is a reasonable probability that its inclusion contributed to the conviction in this case.

Ultimately, the admission of other acts evidence in the form of pending charges against Mr. Faustmann from a different court was unfairly prejudicial to his case due to its highly unfair and prejudicial nature, which substantially outweighs any potential probative value. Therefore, this Court should find that the District Court erroneously exercised its discretion in allowing such

evidence to be used by the State, and that such an error was not harmless, reversing the holding as a result.

CONCLUSION

For the foregoing reasons, this Court should find that the District Court erroneously exercised its discretion in failing to grant a lesser included offense instruction for disorderly conduct because it is wholly contained in the greater charged offense, and there is reasonable evidentiary support for a conviction on the lesser offense and acquittal on the greater. Additionally, this Court should find that the District Court also erroneously exercised its discretion in allowing the introduction of other acts evidence for pending charges against Mr. Faustmann due to the unfair prejudice that evidence carried, far outweighing any probative value. Therefore, this Court should ultimately reverse the District Court's conviction of Mr. Faustmann for unlawful use of computerized communication systems.

Dated at Brookfield, Wisconsin, November 29, 2017.

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CERTIFICATE OF COMPLIANCE

CERTIFICATIONS

Form and Length of Certification - Brief

I certify that this brief conforms to the rules contained in Wis. Stat. s.809.18 (8)(b) & (c) for a brief produced with a proportional Times New Roman font. The length of this brief is 3545 words.

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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 s. 809.19 (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 s. 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.

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APPENDIX

Judgment of conviction 4/21/17