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OF WISCONSIN**

STATE OF WISCONSIN
COURT OF APPEALS, DISTRICT I
Case No. 2019AP806

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KAPRISHA E. GREER,

Defendant-Appellant.

Appeal of a Written Decision and Final Order Entered
April 15, 2019 in Milwaukee County Circuit Court Case
No. 17CM1386, Denying Motion for Post-Conviction
Relief,
Circuit Court Michael J. Hanrahan, Presiding

REPLY BRIEF OF
DEFENDANT-APPELLANT

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ARGUMENT

I. The issue of whether a true threat instruction should have been given, despite the absence of an objection from trial counsel, is appropriate for review for the same reasons given in *State v. Perkins*.

The State's Response Brief begins by arguing that the issue presented here has been waived. The problem for the State is that the trial prosecutor deliberately inserted a constitutional issue into the case, and that created a question of constitutional dimension that should have been resolved through the jury instructions.

In similar circumstances in *State v. Perkins*, 2001 WI 46, 243 Wis.2d 141, 626 N.W.2d 762 the Court held that Perkins had waived his right of review of any allegedly erroneous jury instruction. But it considered the issue nonetheless, stating:

[T]his court may reverse a conviction based on a jury instruction regardless of whether an objection was made, when the instruction obfuscates the real issue or arguably caused the real controversy not to be fully tried. Reversal is available under Wis. Stat. § 751.06 at the discretion of this court.

2001 WI 46, ¶ 12.¹ That same discretionary reversal authority resides in the Court of Appeals under Wis. Stats. § 752.35.²

¹ That statute provides, in pertinent part: "In an appeal in the supreme court, if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried, the court may reverse the judgment or order appealed from, regardless of whether the proper motion or objection appears in the record,"

² That statute provides, in pertinent part: "In an appeal to the court of appeals, if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried, the court may reverse the judgment or order appealed from, regardless of whether the proper motion or objection appears in the record,"

“It is within our discretion to grant a new trial if the real controversy has not been fully tried. Wis. Stat. § 752.35.” *State v. Williams*, 2006 WI App 212, ¶ 12, 296 Wis.2d 834, 845, 723 N.W.2d 719, 725.

The reason the Court in *Perkins* decided to exercise discretionary review, despite a defense waiver of the instruction error, was because it implicated “First Amendment case law relating to statutes criminalizing threats to persons.” 2001 WI 46, ¶ 16.

The question of law presented in this case is whether a new trial should be granted because *the jury instruction relating to the crime of threatening a judge failed to shield the defendant from a conviction based on constitutionally protected speech.*² We conclude that the jury instruction in this case was inadequate. The real controversy in this case has not been fully tried and the defendant is entitled to a new trial.

2001 WI 46, at ¶ 2. (Emphasis added.)

Under Wisconsin Criminal Jury Instruction – 1900, Disorderly Conduct, § 947.01, the concept of “otherwise disorderly conduct” encompasses threatening physical conduct or speech, “or both.” That concept as it appears in the instruction therefore encompasses threatening speech. Here, the prosecution prosecuted Kaprisha Greer under the disorderly conduct statute for, in part, engaging in “otherwise disorderly conduct.”

In *State v. A.S.*, 2001 WI 48, ¶¶ 5-8, 243 Wis.2d 173, 626 N.W.2d 712, the prosecution against A.S. was based on a delinquency petition that alleged that A.S. “engage[d] in abusive *and otherwise disorderly conduct*...” 2001 WI 48, ¶ 5 (Emphasis added.), and the Supreme Court noted that “true threat” conduct falls within the rubric of the “otherwise disorderly conduct” element in Wis. Stat. § 947.01: “We conclude that under these circumstances such conduct supports a finding of probable cause of ‘otherwise disorderly’ conduct. Such violent threats are of the type that tend to disrupt good order....” An issue in the case then became whether A.S.’s threatening speech was “otherwise disorderly”

speech which fell outside the protections of the First Amendment and Article I, Section 3 of the Wisconsin Constitution.

These authorities show that Kaprisha Greer's case has raised a reviewable issue regarding an otherwise disorderly conduct" jury instruction that implicated constitutionally protected speech. Her case presents the same reasons and protected speech issues for review that existed in *Perkins*.

II. The prosecutor and the complaining witness, who responded to a leading question from the prosecutor, deliberately injected the true threat theory into the case as a basis to convict Kaprisha Greer, despite the prosecutor's pretrial representation that he would not do so.

The State's Response Brief next contends that the prosecution did not claim, as an alternative basis for disorderly conduct, that Kaprisha Greer had made a true threat. But Greer's opening brief at 10-15 shows how that State injected the issue into the case, despite pretrial representations to the trial court and to defense counsel that it would not do so.

It also bears mention that this conclusion is supported not only by the fact that the prosecutor launched a leading question that specifically asked JDH whether Greer had threatened him; it was JDH's answer, too, that then brought the true threat issue into the case because he declared, in answer to the leading question, that "the whole video is basically her threatening me" That video of what JDH described as a continuous threat was then was played in entirety (i.e., as a "whole" threat) to the jury. (Transcript of Trial Proceedings, June 4, 2016 at 94).

Then in its closing argument the prosecution referred the jury to the video recording -- twice. (Transcript of Trial Proceedings, June 5, 2016 at 57, 68). Accepting JDH's description, that meant that the jury saw and heard the "whole" threat when the prosecution played it, and then the prosecution referred back to it -- twice -- in its arguments.

Moreover, the precise statement which JDH focused on to show Greer's intent to harm him was her ambiguous statement: "I got something for you." (Transcript of Trial Proceedings, June 4, 2016 at 98). And this statement was then

alluded to by the prosecutor in his rebuttal closing argument. (Transcript of Trial Proceedings, June 5, 2016 at 69). The instructions asked the jury to determine whether Greer's speech was disorderly – in particular, “otherwise disorderly conduct.”

The State, in fairness, cannot breach its pretrial stipulation that it would not pursue Kaprishia Greer for making a “true threat,” and then provoke its victim-witness, through a leading question, to inject the issue directly into the case. See, e.g., *United States v. Shapiro*, 868 F.2d 1125, 1126 (9th Cir. 1989) (“The prosecution then agreed ‘not to offer evidence of Mr. Shapiro's prior felony conviction’ . . . [T]he government struck a “foul blow” when it asked Shapiro questions he reasonably thought would not be asked.”).

III. Omission of the true threat paragraph in the jury instructions was reversible error.

Finally, the State's Response Brief contends any error arising from the combination of the prosecutor's breach of his pretrial stipulation not to present evidence that a true threat was made, with the omission of the WIS JI-Criminal 1900 “true threat” paragraph, was harmless error.

On the contrary, that instruction makes it clear the concept of “otherwise disorderly conduct” is directly part of the first element of the offense, as an alternative mode of committing the offense. Comment 1 to Wis JI-Criminal 1900 also makes it clear that “it is proper to instruct *on all alternatives that are supported by the evidence.*”

Within Wis JI-Criminal 1900 the instruction uses bold typeface to make it clear that the jury must be instructed in a particular fashion “where the state's case *relies on statements or conduct that may constitute a threat.* . . . “(Emphasis added.) Greer has shown that the prosecution (and JDH) did just that – they relied on Greer's alleged statements as evidence of a threat to do harm to JDH.

In that context Justice Wilcox's concurring opinion in *Perkins* at ¶ 55, explains why it is not permissible to apply the harmless error analysis in these situations. “As explained

above, *where jury instructions are devoid of explanation regarding an element of an alleged offense, . . .* there can be no jury verdict on that particular element and, therefore, harmless error analysis—which analyzes cases in terms of the jury verdict—is inapplicable.”

Thus, the harmless error rule need not apply to the error in this case.

CONCLUSION

For the reasons stated above, Kaprisha Greer respectfully requests that this Court reverse the judgment of conviction and remand for a new trial.

Dated November 18, 2019 at Milwaukee,
Wisconsin.

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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 1,295 words.

Dated November 18, 2019.

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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.

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