STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT IV

Case No. 2019AP902-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

VICTORIA L. CONLEY,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF, ENTERED IN THE CIRCUIT COURT FOR DANE COUNTY, HONORABLE NICHOLAS J. MCNAMARA, CIRCUIT COURT JUDGE, PRESIDING

REPLY BRIEF OF DEFENDANT-APPELLANT

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Argument

The State Did Not Meets its Burden to Show That the Appellant Understood What Conduct She Was Admitting or What Defenses She Was Waiving

The State cites *State v. Trochinski*, 2002 WI 56, ¶15, 253 Wis.2d 38, 644 N.W.2d 891, for the proposition that "otherwise disorderly conduct" need not be explained. Respondent Br. 3-4. *Trochinski* was not a disorderly conduct case, so it does not prove that. Further, the defendant in *Trochinski* testified in this manner at his hearing on his motion for postconviction relief:

> Q: And did you understand at the time you signed [the plea waiver form] that those were the matters that you were admitting, that these were the elements of the offense?
> A: I understood that they were the elements. I didn't understand what was going to have to be proven to be convicted.

Id. at ¶13, n. 8.

So, in *Trochinski,* the issue was whether the appellant had no knowledge of what was to be proven even though it

was explained to him, which seems odd, but that is what it looks like. In our case, "otherwise disorderly conduct" was not explained to Ms. Conley, and she did not say that it was explained to her. She did not know what it meant, and she felt she had a defense to it, which, if it had been explained to her, she could have raised.

The State complains that the source of the language "having a tendency to disrupt good order" is obscure. State Br. at 7. I thought it was clear from the opening brief that this comes from *State v. Givens*, 28 Wis.2d 109, 135 N.W.2d 780 (1965):

> We believe that the disorderly conduct statute in the cases at bar is reasonably explicit; the six types of affirmative conduct which are expressly listed in the statute all tend to disrupt good order and to provoke a disturbance. When the statute, after the specific enumerations, in a "catchall" clause proscribes "otherwise disorderly conduct" which tends to "provoke a disturbance," this must mean conduct of a type not previously enumerated but similar thereto in having a tendency to disrupt good order and to provoke a disturbance.

Id. at 115, cited in App. Br. at 5. There was nothing unclear about that in the appellant's opening brief.

The State goes on to argue that because the State chose not to include in the charging document the language "provoke a disturbance," that excises the requirement that a person know that "otherwise disorderly conduct" means conduct of a type not previously enumerated but similar thereto in having a tendency to disrupt good order and to provoke a disturbance. *See Givens*, 28 Wis.2d at 120. The appellant agrees that the State does not have to charge every disorderly conduct as one that "provokes" a disturbance but if the charge contains the catch-all phrase "otherwise disorderly conduct," then a person pleading guilty to it needs to know what that phrase means and that it means conduct of a type having a tendency to disrupt good order and to provoke a disturbance.

The State describes this as on ongoing offense, but not every statute may be described as ongoing. *State v. Giwosky*, 109 Wis.2d 446, 326 N.W.2d 232 (1982), cited

by the State, was, unlike many of the "ongoing offense" cases, not a sexual assault case, but in *Giwosky*, the "throwing of the log and the punches and kicks" all happened on the same place on the riverbank, in quick succession. Anyway, *Giwosky* does not control: that was a jury unanimity issue, not a plea issue, and its holding (and the "conceptually distinct" test is in doubt. *See Schad v. Arizona,* 501 U.S. 624, 635 (1991). *See State v. Derango,* 2000 WI 89, ¶22, 236 Wis.2d 721, 633 N.W.2d 833.

The appellant was not put on notice as to what conduct was she admitting. She did not admit that she was rear-ending a car or hitting the victim, either in the car or in the restaurant. Trial counsel's testimony at the hearing on the motion for postconviction relief was that, "Ms. Conley ... agreed that she engaged in a mutual fight and that was what she was prepared to stipulate as far as forming the factual basis for disorderly conduct." R34:14. That does not translate into her knowing that the State would have had to prove that her conduct tended to disrupt good order and

to provoke a disturbance

Conclusion

For the reasons stated above, as well as those reasons stated in Ms. Conley's brief-in-chief, the Court should reverse the order denying Ms. Conley's motion to withdraw her no contest plea.

Respectfully submitted this 21st day of August, 2020.

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SECTION 809.19(8) CERTIFICATE

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 1091 words.

Signed,

_____
David R. Karpe

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief which complies with the requirements of s. 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 certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Signed,

_____
David R. Karpe