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COURT OF APPEALS

STATE OF WISCONSIN

COURT OF APPEALS, DISTRICT I

Case No. 2019AP2138

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JOSEPH K. EDWARDS,

Defendant-Appellant.

Appeal of a Written Decision and Final Order Entered November 4, 2019 in Milwaukee County Circuit Court Case No. 16CF713, Denying Motion for Post-Conviction Relief, Circuit Court Jean M. Kies, Presiding

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REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. THE STATE'S ARGUMENT THAT EDWARDS' TRIAL COUNSEL FORFEITED THE "TRUE THREAT" INSTRUCTION ISSUE LACKS MERIT BECAUSE OF THE RULING IN *STATE v. PERKINS.*

State v. Perkins, 2001 WI 46, 243 Wis.2d 141, 626 N.W.2d 762 held that it mattered not that defense counsel had not sought a "true threat" instruction. The Court held that it would consider the error and reverse, based on the omission of that instruction, even though counsel had not objected, because the omission of the instruction led to the real issue and real controversy not being tried. See, Defendant's Opening Brief at 13.

II. THE STATE'S ARGUMENT THAT THE PROSECUTION DID NOT RELY ON AN ALTERNATIVE "TRUE THREAT" THEORY OF PROSECUTION IS NOT SUPPORTED BY THE FACTS.

The State's argument (State's Brief at 8-10) contends that the prosecution did not rely on an alternative theory of disorderly conduct that Edwards engaged in "true threat" conduct. This argument, to begin with, at least concedes that there is a valid issue to be debated if "true threat" conduct had become part of the State's case. The State had no choice but to make that concession given the comment to the standard instruction WIS-JI Criminal 1900:

> WHERE THE STATE'S CASE RELIES ON STATEMENTS OR CONDUCT THAT MAY CONSTITUTE A THREAT, THERE MUST BE A TRUE THREAT. ADD THE FOLLOWING.

The State's complaint alleged that Edwards was charged with "otherwise disorderly conduct" precisely, because S.G. had been threatened by his words and conduct, that is, as the complaint stated, he had "caused her to fear for her safety." The entire prosecutorial theme throughout trial was that Edwards' words and conduct had scared and frightened

S.G., under circumstances that tended to cause or provoke a disturbance.

Edward's Opening Brief at pages 9-12 addresses just how the State's witness, S.G., testified about her perceptions of Edward's threatening conduct, how the prosecutor argued that Edwards' conduct and words were threatening, and how the trial court instructed the jury to be on the lookout for abusive or otherwise disorderly conduct that included Edward's conduct and words, and specifically his statements, relying on WIS-JI CRIMINAL 180. These all caused an alternative theory of "true threat" conduct to be presented to the jury and relied upon by the State, even though the instruction did not include the necessary paragraph, as discussed in *State v. Perkins*, 2001 WI 46, 243 Wis.2d 141, 626 N.W.2d 762. The points detailed in Edward's Opening Brief need not be repeated here.

But the State attempts to suggest (State's Brief at 9-10), that the "true threat" theory was an alternative theory that the State had rejected (and had not relied upon). It argues that it instead pursued a main theory of disorderly conduct, totally divorced from any concept of threatening conduct. The key facts supporting this main theory, it argues, were that Edwards: (1) appeared as a stranger dressed in all black; and (2) approached S.G.'s house as she was leaving her garage for the house; and (3) pounded on her front door. But the State could not rely, even in this argument, on those facts alone to comprise a sufficient main theory of disorderly conduct. Instead, those facts formed the background for "an invasive conversation." (State's Brief at 10). It was that invasive conversation, according to the State, that turned the other conduct into threatening conduct. It was the verbal component, regarding her son and her husband, that frightened and "frazzled" S.G.

Once that evidence was in, the court instructed the jury to consider Edwards' statements as evidence (based on Wis-JI CRIMINAL 180) and to consider that disorderly conduct may include verbal conduct. The combination of the preceding facts

and those instructions were an open invitation for the jury to find Edwards guilty of making an abusive or otherwise disorderly "true threat." The jury was then free to enter its verdict without Edwards receiving the protection of the "true threat" paragraph now mandated by *Perkins*.

III. THE STATE'S ARGUMENT THAT OMISSION OF THE INSTRUCTION WAS HARMLESS LACKS MERIT.

Edwards' Opening Brief at page 13 explained why the harmless error analysis, according to *Perkins*, does not apply to this issue. The State's argument that any error here was harmless did not address that aspect of *Perkins*.

Moreover, the State argued in summary fashion (State's Brief at 12) that any error was harmless because his post-S.G.-confrontation behavior (e.g., revealing a machete in his carrybag) was behavior sufficient to meet "the first element of disorderly conduct." But in what respect did Edwards' revealing that his bag contained a machete prove the first element, especially if no one testified that he brandished it in threatening fashion?

The State would overlook that the jury was expressly told that it could consider Edwards' acts *or his words.* Further, it was told that "otherwise disorderly conduct," *"may include physical acts or language or both. . . ."* So the jury was free to render a general verdict on more than one ground, one of which related to speech arguably protected under the First Amendment, rather than dark-colored apparel and creepy conduct. The verdict's generality precludes an argument that any error was harmless because the proof of nonverbal conduct was sufficient to prove disorderly conduct. The State should not be allowed to argue that the verdict was harmless where it cannot possibly show, as is its burden, that the verdict was free of any reliance on Edward's verbal conduct.

CONCLUSION

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

Dated June 14, 2020 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 928 words.

Dated June 14, 2020.

Respectfully submitted,

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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 June 14, 2020.

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