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COURT OF APPEALS

In the Court of Appeals of Wisconsin

District II

Daniel Doubek,

Petitioner-Appellant,

v.

Joshua Kaul,

Respondent-Respondent

Appeal No. 2020AP000704

Appeal from the Judgment of the Brown County Circuit Court, The Hon. Kendall M. Kelley

Reply Brief of Appellant

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Argument

DOJ argues that the "means versus elements" argument was already considered and rejected by this Court in Evans v. Wis.Dept. of Justice, 353 Wis.2d 289, 844 N.W.2d 403, 2014 WI App 31 (Ct.App. 2014). In Evans, however, this Court only considered that issue in the context of whether disorderly conduct is charge as a single means, or multiple means in the conjunctive or disjunctive. The Supreme Court of the United States overruled that logic in Mathis v. United States. Under Mathis, the fact that a crime may be committed by alternative means is DOJ's undoing.

Evans recognized that disorderly conduct has but two elements, a behavior element and a result element. This case focuses on the behavior element. There are multiple means of committing the behavior element. Under *Mathis*, if there does not have to be juror unanimity on the means, the categorial approach must be used. And if the categorical approach is used, the crime either always has a force element or it never does.

Again, *Evans* tells us that disorderly conduct may be charge with multiple means ***in the disjunctive.*** The inference of this Court's pointing that out is that a defendant may be charged with several disjunctive means of committing disorderly conduct, and juror unanimity is not required on which one was committed. Indeed, in Wisconsin "Unanimity is required only with respect to the ultimate issue of the defendant's guilt or innocence of the crime charged, and

unanimity is not required with respect to the alternative means or ways the crime can be committed." *State v. Baldwin,* 101 Wis.2d 441, 304 N.W.2d 742, 747 (1981). Finally, this Court ruled in *State v. Koeppen,* 2000 WI App 121, ¶ 2, 237 Wis. 2d 418, 422, 614 N.W.2d 520 (Ct.App. 2000) that disjunctive means of committee an element of a crime do not require juror unanimity on the mans.

In sum, the Supreme Court of the United States says that if there is no requirement under state law for juror unanimity, then those are just alternative means of committing that element of the crime, and the categorical approach must be applied. Because Wisconsin's disorderly conduct statute fits that description, the categorical approach must be followed. Disorderly conduct does not always have an element of force, so under the categorical approach it cannot constitute a misdemeanor crime of domestic violence.

Even if the modified categorical approach is applied, the Court must consult only certain documents to see which means of which Doubek was convicted. But in the present case, there is no transcript of the plea colloquy available. This Court recognized in *Evans* that a defendant may plead guilty to s subset of what was actually charged in the information. *Evans*, FN 5 ("During his plea colloquy, Evans admitted to pushing his stepdaughter out of a door but not to a number of more serious allegations in the criminal complaint.") In the present case, Doubek was charged with "violent, abusive and otherwise disorderly conduct." R7, p. 14. Without a transcript of the plea colloquy, we have no way of

knowing which of those means Doubek pleaded guilty to. It is entirely possible that Doubek pleaded guilty to only "otherwise disorderly conduct" but not being violent or abusive. Even under DOJ's reading of the law, Doubek would not have been convicted of a misdemeanor crime of domestic violence. If the permissible documents (such as the plea colloquy) are equivocal, "the circuit court would lack any reasonable basis to choose between these competing inferences." *State v. Leonard,* 364 Wis.2d 491, 868 N.W.2d 186 (Ct.App. 2015) FN 11.

DOJ Failed to Follow the Procedure of the Statute

DOJ takes the position that it can take as long is it wants to respond to a petition under Wis.Stats. 175.60(14m). It claims that there is no default judgment. Pretermitting whether that is a correct statement, Doubek did not seek a "default judgment" *per se.* Rather, Doubek points out that DOJ did not abide by the procedural requirements of the statute, and the statute says that the reviewing court must reverse DOJ's revocation in such a circumstance. DOJ failed to respond on time, so this Court must reverse DOJ's revocation of Doubek's CCW.

DOJ continues to claim that Doubek served DOJ at the wrong address, both ignoring the statute and its own regulations in the process. DOJ insists Doubek had to serve DOJ at a post office box, even though the statute requires DOJ to accept personal service. DOJ is unable to explain how Doubek would make personal service on a post office box.

DOJ also references a regulation on a ***different*** topic as support for its claim that the post office box is the correct address for revocation petition challenges. If anything, just the opposite is true. Because DOJ's own regulations only say to use the post office box for ***other*** matters, a logical inference is that the post office box is not to be used for CCW revocations. Moreover, DOJ fails to explain why it was incumbent on Doubek to scour DOJ's regulations for ***other*** matters to find the address to be used for CCW revocations.

Conclusion

For the foregoing reasons, the judgment of the circuit court should be reversed, with instructions to order the reversal of DOJ's decision to revoke Doubek's CCW.

/s/ John R. Monroe
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Certificate of Service

I certify that on September 1, 2020, I served three copies of the foregoing via U.S. Mail upon:

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Certifications:

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) as modified by the court's order for a brief and appendix produced with a proportional serif font. The length of this brief is 2,055 words.

I certify that the text of the electronic copy of the Reply Brief of Appellant is identical to the text of the paper copy of the Reply Brief of Appellant.

I certify that this Reply Brief of Appellant was mailed via priority mail to the Clerk of the Court of appeals on September 1, 2020.

/s/ John R. Monroe

John R. Monroe