In the Supreme Court of Wisconsin

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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1. DOJ Previously Issued a CCW

The Department of Justice ("DOJ") does not attempt to explain the elephant in the room. If, as DOJ asserts, Appellant Daniel Doubek ("Doubek") was convicted of a misdemeanor crime of domestic violence ("MCDV") in 1993, how is it that DOJ issued a concealed weapons carry license ("CCW") to Doubek after the law creating them was passed in 2011? DOJ must have believed at the time of issuance that Doubek had not been convicted of a MCDV after all. The issues in this case, then, cannot be as clear as DOJ thinks they are.

2. Disorderly Conduct Has Multiple Means and Not Elements

This case involves an interpretation of Wis.Stats. § 947.01 (disorderly conduct) and its application to 18 U.S.C. § 922(g)(9). To review, § 947.01(1) provides:

> Whoever, in a public or private place, engages in violent, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly conduct under circumstances in which the conduct tends to cause or provoke a disturbance is guilty of a Class B misdemeanor.

DOJ asserts that the seven "conducts" (violent, abusive, indecent, profane, boisterous, unreasonably loud, and otherwise disorderly) are separate elements of the offense. It may be helpful to discuss the implications of that assertion.

First, if the seven conducts are separate elements, then they describe separate crimes. That is, being boisterous under circumstances that tend to cause or provoke a disturbance is a crime. Being unreasonably loud under circumstances that tend to cause or provoke a disturbance is a separate crime. Presumably, a person could be convicted of two counts of disorderly conduct for being boisterous *and* unreasonably loud under circumstances that tend to cause or provoke a disturbance.

Second, if each conduct is an element of a separate crime, then if a person is charged with multiple conducts, those conducts must be listed in separate counts in a criminal complaint. Wis.Stats. § 971.12(1) ("Two or more crimes may be charged in the same complaint … *in a separate count for each crime*….") [emphasis supplied].

We should pause here to consider these first two implications to Doubek's 1993 charge (singular) for disorderly conduct. The criminal complaint charged Doubek in a single count that he "did: engage in violent, abusive and otherwise disorderly conduct…." R7, p. 14. If, as DOJ asserts, each conduct is a separate element, then clearly Doubek was not charged properly. If the State had intended to charge Doubek with three separate counts of disorderly conduct, it should have drafted the criminal complaint to have three separate counts. The State clearly knew how to draft a complaint with multiple counts, because Doubek also was charged with criminal trespass in a separate count.

Next, even overlooking the improperly drafted criminal complaint, the judgment of conviction shows that Doubek was convicted of a single count of disorderly conduct. R7, p. 13. The question is, which count in the criminal complaint was he convicted of? Was he convicted of violent disorderly conduct, abusive disorderly conduct, or otherwise disorderly conduct disorderly conduct? Because he was only convicted on one count, there is a 67% chance it was not violent disorderly conduct.

Next, why didn't the circuit court state on the judgment of conviction what happened to the other two counts? Whether they were dismissed, read in for sentencing, or otherwise dealt with, shouldn't the judgment say so?

Of course, none of these questions can be answered because the premise, that the seven conducts are separate elements, has no justification or textual support. And, none of the questions even need to be asked if we accept the premise that the seven conducts are merely means of committing the single element of "conduct".

Moreover, if the seven conducts are separate elements, then of course there would have to be juror unanimity as to which element a person charged with disorderly conduct committed. As discussed in Doubek's opening brief, there is no instruction to that effect in Wisconsin's standard jury instructions.

In addition, even DOJ acknowledges that Doubek's "conviction for 'violent, abusive and otherwise disorderly

conduct' was *a* misdemeanor crime of domestic violence…." DOJ Brief, p. 12. DOJ does not try to explain how being charged with three counts of disorderly conduct was only one misdemeanor crime of domestic violence.

Finally, the record does not reveal which count of disorderly conduct Doubek pleaded guilty to. Maybe he pleaded to "otherwise disorderly conduct" but nothing more. In that event, there was no conviction for "violent disorderly conduct," upon which DOJ rests its entire argument.

3. Disorderly Conduct Does Not Meet the Force Test

DOJ next argues that violent disorderly conduct meets the force requirement of MCDV *per se*. This is because, DOJ reasons, "violent implies" the use of force. DOJ is half right. While violent implies the use of force, it does not imply the use of force against a person, the latter of which is a requirement for a MCDV. *United States v. Hayes*, 129 S.Ct. 1079, 172, L.Ed.2d 816, 555 U.S. 414, 421 (2009) ("[I]t suffices for the Government to charge and prove a prior conviction that was, in fact, for an offense committed by the defendant *against a spouse or other domestic victim*.") [emphasis supplied]. In *United States v. Casteman*,134 S.Ct. 1405, 188 L.Ed. 2d 426, 572 U.S. 157 (2014), the Supreme Court gave even clearer guidance on the force requirement:

> [I]t is likely that Congress meant to incorporate that misdemeanor-specific meaning of 'force' in defining a 'misdemeanor crime of domestic violence…. 'Physical force' has a presumptive common-law meaning,… [Prior case law] requires that we attribute the common-law

> meaning of 'force' to [the] definition of a 'misdemeanor crime of domestic violence' as an offense that 'has, as an element, the use or attempted use of physical force.' We therefore hold that the requirement of 'physical force' is satisfied … by the degree of force that supports a common-law battery conviction.'

572 U.S. at 167-168.

It is not enough, therefore, that physical force be used generically against a anything. It must be used "against a spouse or other domestic victim" to the degree that would support a common law battery conviction.

It is not enough for force to be used against the victim's property. Not only would that be inconsistent with the United States Supreme Court's pronouncements in *Hayes* and *Castleman*, but it would be illogical in the context of the federal statute. Keeping in mind that the federal definition actually has two "force" options: 1) use or attempted use of physical force; or 2) the threatened use of a deadly weapon. 18 U.S.C. § 921(a)(33)(A)(ii). Using a deadly weapon against an inanimate object is bit of an oxymoron. After all, what does it mean to be deadly to a vase or DVD?

DOJ fails to articulate what the limits are for force not directed at a person that still qualifies as a MCDV. For instance, what if a husband violently smashes his wife's piggy bank because he wants the money? His wife may not even have been home, but he was violent and his wife was the victim. Would a disorderly conduct conviction under these circumstances constitute a MCDV?

DOJ relies heavily on *Evans v. Wisconsin Department of Justice*, 353 Wis.2d 289, 944 N.W.2d 403, 2014 WI App 31, especially for the proposition that a MCDV need not require force against the person of the victim. But the *Evans* court came to that conclusion without significant analysis, and said in the end, "[other] courts have recognized, as we now do, that a disorderly conduct conviction may qualify *at least some of the time*." *Evans*, ¶ 21 [emphasis supplied]. The emphasized language is *Evans*' undoing. The Supreme Court of the United States has said, "it is impermissible for a particular crime to sometimes count … and sometimes not, depending on the facts of the case." *Mathis v. United States*, 136 S.Ct. 2243, 2251, 195 L.Ed.2d 604 (2016). *Evans* did exactly what the Supreme Court said it could not do.

4. DOJ Impermissibly Considers the Brute Facts

In response to Doubek's complaint that DOJ cannot make its case without considering the "brute facts" of Doubek's conviction, DOJ says it had to consult the brute facts to establish that 1) the victim had a spousal relationship with Doubek, and 2) the force was directed at the victim. DOJ Brief, p. 22. It is DOJ's second point that puts DOJ squarely out of bounds. By claiming it had to determine if the force was "directed at the victim," DOJ is conceding two fatal points.

First, if the force had to be directed at the victim, then DOJ is conceding that force must be directed at a person and not at an inanimate object. This is an important point because

it contradicts *Evans* and *Leonard* and underscores DOJ's shifting position to justify using the brute facts.

Second, if one has to look at the brute facts to see if force was directed at the victim, then implicitly sometimes disorderly conduct is a MCDV and sometimes it is not, "depending on the facts of the case." This is exactly what *Mathis* said is impermissible.

Stated another way, even if disorderly conduct has the eight elements DOJ argues, and even if "violent" is one of the elements, then courts cannot look at the brute facts to determine what that violence was. Instead, they must consider the "least culpable conduct" that would fit the statute. *Simpson v. U.S. Attorney General,* Slip.Op. at 13, No. 19-11156 (11th Cir. August 4, 2021). If the statute is broader than the applicable federal law (in this case MCDV), the statute fails the categorical approach. *Id.,* Slip.Op. at 14.

The modified categorical approach must then be applied. *Id.,* Slip.Op. at 15. Under that approach, uniform punishment for all versions of the crime indicate that the legislature only intended to create one crime and the various versions are "means" and not "elements." *Id.,* Slip.Op. at 16.

Conclusion

The conclusion one must draw is that disorderly conduct does not have as an element, the use of force against a person. Disorderly conduct does not and cannot constitute a misdemeanor crime of domestic violence.

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Certificate of Service

I certify that on September 8, 2021, 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 2,492 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 Supreme Court on September 8, 2021.

/s/ John R. Monroe

John R. Monroe