

David J. O'Leary
Rock County District Attorney

Anne T. Nack
Deputy District Attorney



Office of District Attorney
Rock County Courthouse
51 South Main Street
Janesville, Wisconsin 53545
Phone 608-757-5615
FAX 608-757-5725

RECEIVED
10-05-2020
CLERK OF WISCONSIN
COURT OF APPEALS

For official use only

October 01, 2020

Shelia T. Reiff
Clerk, Wisconsin Court of Appeals
110 E. Main Street
P.O. Box 1688
Madison, WI 53701-1688

RE: State of Wisconsin vs. Aaron Matthew Oleston
Case No. 2020 AP952CR District IV

Dear Ms. Reiff:

Ten copies of the brief for the Plaintiff-Respondent are enclosed for filing in the above-captioned matter. Three copies of this brief have been served by mail on counsel for the Defendant-Appellant.

Sincerely,

A handwritten signature in black ink, appearing to read "Gerald A. Urbik".

Gerald A. Urbik
Assistant District Attorney

GAU/bjf

Enclosures

Cc: ✓ Attorney Steven Roy

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

Case No. 2020 AP 952-CR

AARON MATTHEW OLESTON,

Defendant-Appellant.

BRIEF OF PLAINTIFF-RESPONDENT

ON APPEAL FROM THE JUDGMENT OF CONVICTION
AND SENTENCE IN ROCK COUNTY CIRCUIT COURT,
THE HONORABLE JOHN M. WOOD PRESIDING.

GERALD A. URBIK
Rock County Assistant District Attorney

State Bar No. 1019578

Attorney for Plaintiff-Respondent

Rock County District Attorney's Office
51 South Main Street
Janesville, Wisconsin 53545
(608) 757-5615

STATEMENT OF THE ISSUES

Did the defendant have a First Amendment right to harass off-duty police officers in an attempt to provoke them by conduct which included shouting profanities at them in a public place outside a police station?

Trial Court answered no.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

It is the State's position that neither oral argument nor publication are necessary in this case.

STATEMENT OF THE CASE

The defendant was charged with five counts of disorderly conduct and one count of obstructing in a criminal complaint for repeatedly harassing off-duty police officers outside the Janesville Police Department as they were going to and from work as well as for refusing to put down his video camera after being arrested for disorderly conduct. (R.1). Defense counsel subsequently filed a motion to dismiss all of the charges on the grounds that the defendant had a First Amendment right to harass, insult, swear, and yell at the off-duty police officers. (R.16). The circuit court, in a thorough, well-reasoned oral ruling, denied the defendant's

motion to dismiss in its entirety. (R.59). Defense counsel then filed a petition to appeal the circuit court's decision, which was also denied.¹

At the defendant's trial, Daniel Schoonover testified that on August 13, 2018, at about 2:30 p.m., he was arriving for work at the Janesville Police Department when he observed the defendant standing on the sidewalk in front of the police department holding a video camera and yelling loudly. (R.65:98-100). Schoonover was wearing plain clothes and carrying a backpack. (R.65:99). After Schoonover said, "hi" to the defendant, the defendant asked him if he "worked for this piece of shit organization," called him a Nazi, and told him he worked for "blue ISIS." (R.65:99-100). Schoonover also testified that the defendant was pointing a video camera at both him and the employee door to the police department during this time and that there were two or three apartment buildings within "shouting distance of the police department," including an elderly retirement home "right across the street," and a public housing department building "just to the north." (R.65:100-

¹ It appears that neither the petition for leave to appeal nor the denial of the petition were included in the Appellate Record, but these events are clearly

101). Schoonover further testified that he could hear the defendant over 100 feet away and he was disturbed by the defendant's conduct. (R.65:102-103).

Robert Gruenwald testified that shortly after the defendant's encounter with Schoonover, the defendant confronted him as he and Brian Naber were leaving the police department after ending their shifts as police officers. (R.65:104-105). The defendant asked them if they were janitors and after being told they were police officers, the defendant said, "oh, off-duty," asked them if they were going to beat their wives and yelled something along the lines of "you guys are assholes," or "you're just assholes." (R.65:106). Gruenwald was not wearing a police uniform nor carrying a gun at the time of his contact with the defendant. (R.65:105-106). Gruenwald also testified that there were apartment buildings nearby as well as a public street and sidewalk where the defendant was yelling his profane insults. (R.65:106-107). Gruenwald, like Schoonover, was disturbed by the defendant's conduct. (R.65:107).

Brian Naber testified consistent with Gruenwald (R.65:109-111). Naber was also wearing civilian clothing and not carrying a gun. (R.65:109-110). Additionally, Naber was disturbed and felt threatened by the defendant's actions. (R.65:110). Although Naber did not recall anyone walking or driving by at the time of the incident, it was "common for people to be walking through the area" as the police department was located both in a residential area and in the downtown area. (R.65:112).

Chad Pearson testified that he was also confronted by the defendant around the same time as Gruenwald and Naber after ending his shift as a Janesville Police Department Sergeant. (R.65:115-116). Again, Pearson was wearing civilian clothing and not carrying a firearm. (R.65:115). Pearson, who was leaving the police department with off-duty police officers Bradley Rau and Laura Smith, saw the defendant outside the police department holding a camera. (R.65:115). Pearson heard the defendant talking very loudly and say something along the lines of, "are you guys done messing with people lives?" or "fucking with people's lives." (R.65:116). Pearson, Rau, and Smith changed their route of

travel to avoid further contact with the defendant by cutting across the grass to get to their vehicles. (R.65:117). Pearson was disturbed over the fact that the defendant tried to confront him about police matters while he was off duty going to his personal vehicle while the defendant was pointing a camera at it. (R.65:118). Pearson also knew that there was an apartment complex “kitty-corner across the street,” that a lot of people lived in the area, and that there was a lot of vehicle traffic that passed through the area. (R.65:117-118).

Rau and Smith testified similarly to Pearson. (R.65:122-124, 144-148). Rau specifically recalled that the defendant was using profanity while talking in a loud tone of voice. (R.65:123-124). The defendant got within five feet of Rau and video recorded him while he was in his personal vehicle, which disturbed Rau. (R.65:124). Smith, like Pearson, testified that she, Pearson, and Rau had cut through the grassy part of the parking lot to get to their vehicles in order to avoid a confrontation with the defendant. (R.65:145). Additionally, Smith testified that the defendant “began following us down the sidewalk” while “yelling

something as he was recording us.” (R.65:145). Smith was also disturbed by the defendant’s conduct and recalled the defendant following Rau to his personal vehicle and “recording him from the passenger’s side as he pulled away.” (R.65:146). Upon having her recollection refreshed, Smith further recalled that the defendant made a comment along the lines of, “are you having fun fucking with people lives,” in a “loud, boisterous type of voice.” (R.65:146).

Mario Vitaioli was off duty leaving the Janesville Police Department on August 15, 2018, at about 3:00 p.m. when he was confronted by the defendant. (R.65:149). The defendant started to argue with him about not having a front license plate, which disturbed Vitaioli. (R.65:151).

Officer Erin Betley testified that she was working on-duty as a Janesville Police Department on August 15, 2018, at 3:00 p.m. when she recognized the defendant video recording patrol cars as they were leaving the garage. (R.65:152-153). Betley then saw the defendant yell at Vitaioli and then at Officer Wiley concerning the lack of a license plate on Vitaioli’s car. (R.65:153). Betley also testified that the defendant was “shouting and doing so in a way that was

causing quite a disturbance.” After she assisted Wiley in arresting the defendant, the defendant was taken to the booking room at the Janesville Police Department. (R.65:155). While speaking to Wiley, the defendant made a comment about Betley sucking “plenty in her day,” referring to male genitalia, which disturbed Betley. (*Id.*).

Jeremy Wiley testified that he was off-duty on August 13, 2018, at about 2:30 p.m. when he was confronted by the defendant as he was arriving for work at the police department. (R.65:153). During this incident, the defendant told Wiley to “suck a dick,” “fuck you,” and that Wiley was an “asshole.” (R.65:163). Wiley was disturbed by these comments and when asked why, he responded, “because I felt like I was being harassed. I was just trying to go to work.” (R.65:164). Wiley again had contact with the defendant while on duty on August 15, 2018, when he observed the defendant confronting Vitaioli about a missing license plate on his car. (R.65:165). Wiley also testified about video recordings that were played for the jury showing confrontations between the defendant and both on-duty and off-duty police officers. (R.65:166-170; R.42, Exhibits 2-4).

Both the defendant and his wife testified during the defense case. (R.65:194-233). The defendant's wife did not witness any of the events leading to the defendant's charges and her testimony was for the most part limited to the defendant's activities before and after the relevant time periods. (R.65:194-204).

When the defendant testified, he did not deny engaging in any of the conduct testified to by the State's witnesses, but claimed to be expressing concern about a number of societal issues. (R.65:208). On cross-examination, the defendant denied hating police officers, but admitted to posting a cartoon on YouTube depicting a pig in a police uniform being shot through the back of a head with the caption, "FUCK POLICE." (R.65:231; R.43). Additionally, although the defendant maintained he only confronted the off-duty police officers to express his concerns about societal problems, he admitted he never mentioned any of these issues when he was yelling profane insults at them. (R.65:232). The defendant also denied going to the Janesville Police Department to deliberately provoke them into a confrontation, but this denial was contradicted by the defendant's own words on one of his

video recordings. (R.65: 232-233; R.42: Exhibit 3). The defendant was subsequently found guilty on all five counts of disorderly conduct and not guilty of the single count of obstructing. (R.65:282-285). The defendant is now appealing his convictions for disorderly conduct.

ARGUMENT

THE DEFENDANT'S CONDUCT WAS DISORDERLY AND NOT PROTECTED UNDER THE FIRST AMENDMENT.

The Defendant's argument in this case is that the disorderly conduct charges alleged in Counts 1-5 should have been dismissed because the Defendant's alleged conduct of confronting off duty-police officers by yelling and swearing at them as they were arriving to and leaving from the Janesville Police Department is constitutionally protected behavior. The Defendant is wrong. See *State v. Breitzman*, 2017 WI 100, ¶ 54, 378 Wis.2d 431, 904 N.W.2d 93. In *Breitzman*, the Court upheld the defendant's conviction for disorderly conduct under Section 947.01(1) finding that the defendant's actions of directing profanity toward her son combined with the surrounding circumstances was sufficient to establish the defendant's guilt in the case, notwithstanding

any potential First Amendment challenge. *Id.* at ¶ 58 (cites omitted). See also *In the Interest of A.S.*, 2001 WI 48, ¶ 1, 243 Wis.2d 173, 626 N.W.2d 712 (“speech alone in certain contexts can constitute disorderly conduct.”); and *In the Interest of Douglas D.*, 2001 WI 47, ¶ 22, 243 Wis.2d 204, 626 N.W.2d 725 (Section 947.01(1) can “be applied to speech, unaccompanied by physical acts.”).

The Defendant’s reliance on the United States Supreme Court’s decision in *Houston v. Hill*, 482 U.S. 451, 107 S.Ct. 2502 (1986), is misplaced for at least three reasons. First, the *Hill* case involved an overbreath challenge to a municipal ordinance which prohibited interfering with a police officer while executing his or her duties. Second, unlike the *Hill* case, the allegations in this case involve the defendant harassing off-duty police officers. Finally, the Court noted in its opinion that the ordinance was “not narrowly tailored to prohibit only disorderly conduct or fighting words...” Obviously, this case involves a direct application of the Wisconsin disorderly conduct statute to the Defendant’s conduct.

It is important to note that it is not just the defendant's speech that is at issue, but his conduct as well. As the evidence at trial established, the Defendant either initiated or attempted to initiate contact with off-duty police officers by confronting them outside of the Janesville Police Department. As noted in the *Breitzman* case, speech involving fighting words, obscenity and defamatory speech are not protected under the First Amendment. Even if the Court were to treat the off-duty police officers as on duty officers, the Defendant's alleged comments to them along the lines of "I don't talk to terrorists, so fuck you... suck a dick...you fucking thug," "you work for this piece of shit organization, you Nazi, Isis organization," "you guys are assholes" and "are you having fun fucking with people's lives?" fall within the legal definitions of fighting words, obscenity and defamatory speech and thus subjects the Defendant to prosecution under Section 947.01 of the Wisconsin Statutes. See *Lane v. Collins*, 29 Wis.2d 66, 72, 138 N.W.2d 264 (1965)(referring to a police officer as a "son-of-a-bitch" constituted abusive language which could provoke retaliatory conduct).

Further, in at least three of the disorderly conduct charges, the Defendant is alleged to have yelled profanities at the off-duty officers. As the Wisconsin Supreme Court noted in *In the Interest of Douglas D.*, unreasonably loud and abusive speech are “the nonspeech elements [which] constitute the proscribed ‘conduct’ under sec. 947.01. And it is these elements that, consistent with the First Amendment, can be punished under sec. 947.01.” *Id.* at ¶ 24. In addition, the “fact that the abusive language is directed to a policeman or other law enforcement officer and is not overhead by others does not prevent it from being a violation of such statute or ordinance.” *Collins*, 29 Wis.2d at 72.

In his brief, the Defendant fails to address the fact that the alleged disorderly conduct offenses occurred during the day at a public place (a police station). Given the time and location of the alleged conduct, there was a strong likelihood that other people who were not police officers such as civilian employees, arrested suspects, crime victims, or just individuals who happened to be walking by the police department could have been present at the time these incidents. This is a significant fact which should be taken

into consideration by the Court in its analysis of the issues in this case. As stated in *Collins*, however, whether or not other people actually witnessed the Defendant's interaction with the off-duty officers is irrelevant. See also *In the Interest of A.S.* at ¶ 40 ("The emphasis of the disorderly conduct statute is not on the reaction of the listener or observer, but instead on the conduct in light of the circumstances."); and WIS JI-Criminal 1900 (Proof of an actual disturbance unnecessary to establish a violation of Section 947.01).

In denying the defendant's motion to dismiss, the circuit court described the defendant's conduct detailed in the complaint and stated that, "I think it would be fair to characterize this as essentially stalking these officers." (R.59:49). This in fact is consistent with the evidence presented at trial. In his brief, however, the defendant fails to address the proposition that stalking behavior can constitute disorderly conduct. Additionally, the defendant fails to address the fact that with the exception of Officer Betley, the other officers were off-duty at the time they were confronted by the defendant. The circuit court appropriately considered the significant distinctions when reviewing the First

Amendment cases cited by the defense. (R.59:49). Because the off-duty police officers did have a constitutional right to be left alone, the defendant's actions were not protected under the First Amendment. *Hill v. Colorado*, 530 US 703, 716, 120 S.Ct. 2480 (2000). Included in this right is "the right to free passage in going to and from work. . ." *Id.* at 717. While the defendant attempts to undercut the significance of this holding by citing a dissent by Justice Scalia, "a dissent is what the law is not." *State v. Perry*, 181 Wis.2d 43, 49, 510 N.W.2d 722.

In his brief, the defendant invites this Court to "Follow the Modern Trend and Refrain From Criminalizing Profanity." Appellant's Brief, Page 15. The defendant overlooks the important fact, however, that this Court is "principally an error-correcting court and . . . bound to follow our supreme court case law." *State v. Donner*, 192 Wis.2d 305, 316, 531 N.W.2d 369 (1995). As stated previously, the Wisconsin Supreme Court in *Breitzman* upheld the defendant's conviction for disorderly conduct under Section 947.01(1), finding that the defendant's actions of directing profanity toward her son combined with the surrounding

circumstances was sufficient to establish the defendant's guilt in the case. *Breitzman* at ¶ 58. For this reason, this Court should decline the defendant's invitation and disregard the holdings of cases from the U.S. Court of Appeals, which are contrary to decisions from the Wisconsin Supreme Court and the United States Supreme Court.

Similarly, the Wisconsin Supreme Court has recognized that profanity directed at an on-duty police officer is not necessarily protected by the First Amendment in the *Collins* case and the U.S. Supreme Court has also held that directing profanity at a police officer can constitute "fighting words," which the defendant acknowledges is not protected by the First Amendment. See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-574, 62 Ct. 776 (1942). Again, this Court should apply these holdings unless and until they are reversed.

An analyses of the evidence presented at the defendant's trial supports the jury's guilty verdict as to each disorderly conduct count:

Count 1 (as to Daniel Schoonover)²: The defendant's actions of yelling loudly at off-duty Officer Schoonover that he was a Nazi, worked for a "piece of shit organization" and "blue ISIS" could certainly be considered fighting words under *Collins* and yelling profanity which could be clearly heard not only by Schoonover, but potentially members of the general public could properly be considered disorderly conduct pursuant to *Breitzman*, *Douglas D.*, and *Chaplinsky*.

Count 2 (as to Jeremy Wiley): The defendant's actions of telling Wiley to "suck a dick," "fuck you" and calling him an "asshole" also constitutes fighting words and profanity.

Count 3 (as to Robert Gruenwald and Brian Naber): The defendant's actions of asking Gruenwald and Naber if they were going home to beat their wives, yelling at them that they were "assholes" so not only they but members of the public could hear constituted both fighting words and was profane.

Count 4 (as to Chad Pearson, Laura Smith, and Bradley Rau): The defendant's actions of directing profanity

² In his brief, the defendant appears to have switched the affected officers for some of the counts. The State's identification of the appropriate officer or officers for each count is consistent with the verdict forms returned by the jury. (R.45-49).

at the officers and making comments to them about “fucking with people lives” is again unprotected speech under U.S. Supreme Court and Wisconsin Supreme Court precedent. Additionally, the defendant’s conduct of following the off-duty officers to their personal vehicles while directing profanity at them is not protected under the First Amendment.

Count 5 (no specific victim alleged): The defendant’s conduct of loudly confronting Vitaoli about not having a license plate on his vehicle was disorderly, unprotected speech. Additionally, telling Officer Wiley that Officer Betley had engaged in numerous prior acts of facilitio in Betley’s presence constituted fighting words.

CONCLUSION

As the defendant concedes, the First Amendment is not absolute. Additionally, individuals who choose to serve their communities as police officers should have the same constitutional right to be left alone as any other citizen. Because the defendant’s conduct strayed into the realm of unprotected speech and behavior, which was found by a jury of his peers to constitute five separate counts of disorderly conduct, the Court should uphold the defendant’s convictions.

Dated this day of October, 2020.

Respectfully submitted,

Gerald A. Urbik
Assistant District Attorney

Gerald A. Urbik

State Bar #1019578

Attorney for Plaintiff-Respondent

Rock County District Attorney's Office
51 S. Main Street
Janesville, Wisconsin 53545
(608)757-5615

CERTIFICATION

I certify 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 points for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line. The length of the brief is 3,338 words.



CERTIFICATE OF
COMPLIANCE WITH WIS.
STAT. § (RULE) 809.19(12)

I hereby certify that:

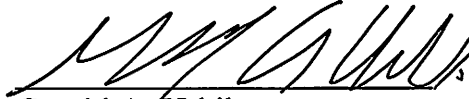
I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

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.

Dated this *1st* day of October, 2020.

A handwritten signature in black ink, appearing to read "Gerald A. Urbik", written over a horizontal line.

Gerald A. Urbik
Assistant District Attorney