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COURT OF APPEALS OF WISCONSIN
DISTRICT II
Appeal No. 2021AP000218
Circuit Court Case No. 2018CV002074

TOWN OF BROOKFIELD,

Plaintiff-Respondent,

v.

MARTIN M. GONZALEZ,

Defendant-Appellant.

ON APPEAL FROM THE
CIRCUIT COURT OF WAUKESHA COUNTY
HONORABLE LAURA F. LAU, PRESIDING

PLAINTIFF-RESPONDENT'S BRIEF

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STATEMENT OF ISSUE

Whether Gonzalez's social media postings which resulted in his conviction for disorderly conduct constituted an exercise of Gonzalez's right of free speech protections afforded by the First Amendment of the U.S. Constitution and Section 3 of Article I of the Wisconsin State Constitution?

Circuit Court: The Circuit Court concluded that Gonzalez's social media postings did not constitute an exercise of Gonzalez's right of free speech subject to constitutional protection.

STATEMENT ON ORAL ARGUMENT

The Plaintiff-Respondent is of the opinion that oral arguments are not required and would not provide any substantial assistance to the court of appeals in resolving the issues presented in this appeal.

STATEMENT ON PUBLICATION

The Plaintiff-Respondent does not request publication of any decision issued by the court of appeals in this matter.

STATEMENT OF CASE

Following a one-day jury trial, the Defendant-Appellant Martin M. Gonzalez (herein "Gonzalez") was convicted of violating Sec. 9.01 of the Town of Brookfield (herein the "Town") Municipal

Code prohibiting individuals from engaging in disorderly conduct. Section 9.01 of the Town Municipal Code incorporates by reference the prohibition against activities involving disorderly conduct as outlined in Sec. 947.01(1), Wis. Stats.

The events leading up to issuance of the disorderly conduct citation and the conviction which is now subject of this appeal can be summarized as follows:

On January 2, 2018, Garrett Bartlet (herein "Bartlet") attended a showing of *Jumanji* at the Majestic Theater in the Town of Brookfield. Bartlet was accompanied by several friends. (R34:70-71; Ap-A. 58-59). The showing was in a "$5 Tuesday" and was at near capacity with 102 patrons including Gonzalez and his friend Edgar. (R34:98-99, 106; Ap-A. 86-87, 94). Bartlet had played youth baseball with Gonzalez and considered him an acquaintance. (R34:88; Ap-A. 76).

Bartlet, and presumably Gonzalez, had attempted to attend an earlier showing of *Jumanji*, but because the earlier showing was sold out, attended the 10pm showing instead. (R34:71; Ap-A. 59).

While sitting in the theater, Bartlet by "happenstance" or "randomly" reviewed an Instagram Story posted by Gonzalez.

(R34:85; Ap-A. 73). Bartlet had not seen Gonzalez at the theater and did not know he would be there. (R34:85; Ap-A. 73). Conversely, Gonzalez did not know Bartlet would be at the theater and did not direct his social media posts to Bartlet. (R34:85-86; Ap-A. 73-74). Gonzalez had about 300 social media followers. (R34:140-141; Ap-A. 115-116).

Bartlet viewed three images in Gonzalez's Instagram Story:

> 1) A photo of a movie ticket for the 10pm Jumanji showing. (R20, AP-A. 42). The photo was captioned "Have to wait till 10 (happy face emoji)." (R20, Ap-A. 42).
> 2) A photo of a loaded magazine and bullets with no caption. (R21, Ap-A. 43).
> 3) A photo of a darkened movie theater with no caption. (R22, Ap-A. 44).

After viewing Gonzalez's Instagram Story, Bartlet switched to the SnapChat app and saw a fourth image. (R34:83; Ap-A. 71). That image was of:

> 4) A pistol and the magazine. (R23, Ap-A. 45).

The timestamp on the social media sites indicated that the fourth image was posted contemporaneously with the second image of the loaded magazine and bullets. (R34:82-83; Ap-A. 70-71).

At the trial, the photos were marked as Exhibits 1, 2, 3, and 4, and were published to the jury. Bartlet was then asked the following questions and provided the following answers relating to the

photographs and the reaction of he and his friends after reviewing the photographs in the crowed movie theater:

Q How did you feel when you looked at these photographs in the movie theater?
A Obviously troubled. The fact that you could see my friends and I in the very last picture obviously was quite jarring, and just the sequence, the rapid sequence of these pictures that were being taken from the tickets to the loaded magazine to obviously the picture of the movie theatre. It was startling, to say the least, and I guess just to summarize, my friends and I were worried about our safety and the safety of those around us immediately
Q Is it safe to say you felt you were in a dangerous situation?
A Yes, you could say that.
Q All right. After you saw these, did you take any action?
A I convened with a friend to my right, just showed him immediately what I had seen. He didn't have much of a reaction verbally, but obviously he was quite scared as well. So he and I decided, primarily I decided to leave the theatre. And as we were on our way out we decided it would be best if we approached a security guard and informed him of what our decisions were that we had just made and what was going on or what we believed to be going on.
Q When you originally walked out of the theatre, are you saying you walked out to leave the movie?
A Yes, sir.
Q Why did you decide to inform movie security?
A On the off chance, well we were worried about our safety. And immediately I had thought on the off chance that something actually does happen, there is a disturbance or violence that occurs and we had prior knowledge about being able to leave, there are a bunch of families and obviously children there. I would feel horrendous if something were to have happened and

they didn't have that prior knowledge. That's why I reached out to the security officer.

Q All right. You danced around a little bit. I am just going to ask you directly. Did you think there was a chance there was going to be a shooting in the movie theatre that evening?

A Based on what I had seen on his stories, I thought there was a chance there would be. (R34:76-78; Ap-A. 64-66).

The security guard contacted the Town of Brookfield Police Department, and Town police officers immediately responded. The police officers reviewed the photos with Bartlet and concluded that the officers needed to detain Gonzalez. (R34:103-106; Ap-A. 91-94). The theater lights were switched on, the projector was turned off, and the police officers then detained and handcuffed both Gonzalez and his friend Edgar. (R34:96, 106-107; Ap-A. 84, 94-95).

Upon completion of the investigation into the circumstances resulting in Gonzalez's detention, the Town issued a disorderly conduct citation in accordance with Sec. 9.01 of the Town Municipal Code which incorporates, by reference, Sec. 947.01(1), Wis. Stats. Gonzalez was convicted of disorderly conduct in the Town of Brookfield Municipal Court, and appealed that conviction to the Circuit Court of Waukesha County which resulted in the jury verdict and judgment of the court which is now the subject matter of this appeal.

Gonzalez elected not to attend or offer testimony at the trial. At the conclusion of the trial, the jury was instructed that disorderly conduct, as defined in Sec. 9.01 of the Town Code is "committed by a person who, in a public or private place, engages in violent, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly conduct under circumstances in which such conduct tends to cause or provoke a disturbance." (R34:149).

The jury of 6 persons unanimously found Gonzalez to have engaged in disorderly conduct in violation of the prohibition contained in the Town Municipal Code. The court then under judgment, based on the verdict, imposed a forfeiture of $628. (R34:173; Ap-A. 124). From that judgment, this appeal follows.

STANDARD OF REVIEW

At the outset, it is important to recognize that Gonzalez was issued a municipal citation for disorderly conduct. Thus, this is a ***civil proceeding*** and is not a ***criminal prosecution***. This distinction is relevant for several reasons:

First, the burden of proof in a civil proceeding is different from the burden of proof in a criminal proceeding. Thus, in this case, the jury was instructed that in order to find Gonzalez guilty of disorderly

conduct, the jury's verdict must be based upon clear, satisfactory and convincing evidence. (R34:125; Ap-A. 113). Had the prosecution been a criminal disorderly conduct prosecution, the jury would have been instructed that the jury's findings must meet the "beyond a reasonable doubt" standard.

Second, many of the cases cited by Gonzalez, and many arguments offered by Gonzalez, are based upon cases involving criminal prosecutions, not civil disorderly conduct prosecutions. As a result, many of the arguments are misplaced.

By way of illustration, Gonzalez argues that the trial court erred by not applying the *mens rea* burden which would have required the Town to prove that Gonzalez acted with criminal or malicious intent. That standard does not apply because the prosecution in this case involved the civil prosecution, not a criminal prosecution.

The jury returned the verdict and Gonzalez now appeals the jury's verdict, and the judgment entered by the court based on that verdict. The standard of appellate review of a jury verdict is well established:

> The standard of review of a jury verdict is that it will be sustained if there is any credible evidence to support the verdict. When the verdict has the trial court's approval, this is even more true. The credibility of the witnesses and the weight afforded their individual testimony is left to the province of the jury. Where more than one reasonable inference may be

> drawn from the evidence adduced at trial, this court must accept the inference that was drawn by the jury. It is this court's duty to search for credible evidence to sustain the jury's verdict. *Fehring v. Republic Ins. Co.*, 118 Wis. 2d 299, 305-06, 347 N.W.2d 595, 598 (1984).

ARGUMENT

I. NEITHER THE FIRST AMENDMENT OF THE U.S. CONSTITUTION NOR SECTION 3 OF ARTICLE I OF THE WISCONSIN STATE CONSTITUTION PRECLUDED ISSUANCE OF THE DISORDERY CONDUCT CITATION NOR THE SUBSEQUENT CONVICTION FOR VIOLATING THE TOWN DISORDERLY CONDUCT ORDINANCE

Gonzalez argues that the social media postings are protected by Gonzalez's right of free speech and cannot, as a matter of law, support either issuance of the municipal citation nor the subsequent judgment of conviction entered by the court. These arguments are both misplaced and without legal merit.

Not all exercises of free speech are protected. As the United States Supreme Court has held, "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic." *Schenk v. U.S.*, 249 U.S. 47, 52, 39 S.Ct. 247 (1919). While Gonzalez did not, in the instant case, stand up in his seat and yell "fire", his conduct nonetheless had the same effect and thus said conduct is not protected by the First Amendment.

One of the categories of unprotected speech that is acknowledged by Gonzalez, and is also applicable in the instant case, is the category identified as "true threat".[1]

The Wisconsin Supreme Court has adopted an objective, reasonable person true-threat standard that is applied from the perspectives of both the speaker and the listener. *State v. Perkins,* 2001 WI 46, ¶ 29, 342 Wis. 2d 141, 626 N.W.2d 762. Under that standard "a true threat is a statement that a speaker would reasonably foresee that a listener would reasonably interpret as a serious expression of a purpose to inflict harm, as distinguished from hyperbole, jest, innocuous talk, expressions of political views, or other similarly protected speech. ***It is not necessary that the speaker have the ability to carry out the threat. In determining whether a statement is a true threat, the totality of the circumstances must be considered.***" *Id.* (Emphasis added)

Gonzalez argues, at Pages 15-17 of his Brief, that the objective true threat standard adopted in *Perkins* has been superseded by *Virginia v. Black*, 528 U.S. 343 (2003). Specifically, Gonzalez asserts

[1] The jury was instructed that in order to establish the elements of disorderly conduct, the jury must find that the evidence presented constituted a "true threat". (R34:150)

the Supreme Court determined that a true threat "must include the 'intent to commit' violence." Gonzalez is incorrect.

Gonzalez contends that *Black* replaced the objective true threat standard with his subjective standard, based in part on a statement in the *Black* decision that "[t]rue threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Id.* at 359. Not only does Gonzalez quote this statement, but underlines for emphasis a portion thereof. Despite Gonzalez's attempt to draw this Court's attention to such statement as the legal standard which applies, that is not the case.

The statement of the *Black* court cited by Gonzalez merely provides that the true threats "encompass" statements in which a speaker purposely communicates 'an intent to commit an act of unlawful violence.' *Id.* at 359. The use of the term "encompass" in *Black* means that true threats include, *but are not limited to*, situations where the speaker subjectively intends a threat. See *State v. Maier,* No. 2013AP1391-CR, 2014 WL 181051, ¶ 20 (Wis. Ct. App. May 8, 2014) (unpublished). Accordingly, the *Maier* Court rejected the argument that *Black* requires that the speaker of a true threat must

have a subjective intent to threaten and found no conflict between *Black* and *Perkins* that would justify departing from the *Perkins* objective true threat standard. *Maier*, 2014 WL 181051, ¶ 21. A similar argument that *Black* narrowed the definition of true threats was also rejected in *In re Robert T.*, 2008 WI App 22, ¶¶ 4, 17-18, 307 Wis. 2d 488, 746 N.W.2d 564.

Additionally, *Black* did not address the constitutionality of the objective standard at all because the Virginia statute at issue in *Black* (statute prohibiting cross-burning with the intent to intimidate) did not employ an objective standard, but rather required subjective intent to intimidate as a *statutory* element. See *Id.* at 348. The analysis in *Black*, and particularly that quoted by Gonzalez at Page 16 of his brief, is phrased in terms of subjective intent because such intent was an element of the statute the Court was interpreting. The *Black* Court had no occasion to address whether an objective true threat standard is constitutionally permissible.

The statute at issue in the instant case, Wis. Stat. § 947.01(1) does not include "intent" as an element of the offense. It is well-settled law that a civil disorderly conduct charge in Wisconsin is appropriate in situations where the conduct in question has the

possibility of provoking a disturbance in the community at large even if the conduct itself is private and non-threatening in nature. *State v. Schwebke*, 2002 WI 55, ¶ 30, 253 Wis.2d 1, 644 N.W.2d 666.

In *Schwebke*, the defendant was convicted of several counts of disorderly conduct for sending phone calls and mailing private letters to four individuals. *Id.* at ¶ 2. The letters that were sent included newspaper clippings and private information concerning the recipients. *Id.* at ¶ 5, 6. The content of the mailings were not in and of themselves threatening, rather they were complimentary, however they made the recipients feel as if their privacy was being violated. Id. at ¶ 10. The recipients experienced intense anxiety and paranoia as a result. *Id.* at ¶ 14. Schwebke argued that the non-threatening and private nature of the conduct made Wis. Stat. § 947.01 inapplicable, and that his actions did not qualify as "otherwise disorderly." *Id.* at ¶ 19. The court reasoned that Schwebke's conduct caused disturbances in the lives of the recipients and was disruptive towards peace and good order in the community thus the conviction was upheld. *Id.* at ¶ 32.

Conduct and speech that is likely to incite imminent disorder, aided by the precluding circumstances, can be prosecuted under the

disorderly conduct statute. *State v. Minniecheske*, 212 Wis. 2d 645, 570 N.W.2d 64 (Wis. Ct. App. 1997). In *Minniecheske,* a police officer observed a number of the defendants' cows had gotten loose on village property. *Id.* at 64. When the village clerk called Minniecheske to ask him to remove the cows the conversation soured. *Id.* Minniecheske refused, eventually saying, "Do I have to bring in the armed militia to resolve this?" *Id.* The clerk interpreted this as a threat and informed the police who then set up a roadblock around Minniecheske property. *Id.* While no militia arrived, Minniecheske was still charged and convicted of disorderly conduct. *Id.* Minniecheske's threat was interpreted as legitimate as he had prior run-ins with the law and was involved in militia groups. *Id.* On appeal, the court ruled that under the circumstances Minniecheske's words were likely to produce imminent public disorder and conviction was upheld. *Id.* (quoting *Hess v. Indiana*, 414 U.S. 105, 109, 38 L.Ed.2d 303, 94 S. Ct. 326 (1973)).

Finally, it has been established that disorderly conduct statutes can cover certain types of speech unaccompanied by actions, and there are limits on how far free speech extends. *In re A.S.*, 2001 WI 48, 243 Wis. 2d 173, 626 N.W.2d 712. Types of speech that are lewd,

obscene, profane, libelous, and those whose "very utterance inflict injury or tend to incite an immediate breach of the peace" can be prosecuted under the law of disorderly contact. *Id.* at ¶ 15, (quoting *State v. Zwicker*, 41 Wis. 2d 497, 510, 164 N.W.2d 512 (1969)).

As in *Schwebke,* the posts that Gonzalez made on his social media may not have been inherently threatening. However, looking at the "totality" of the circumstances, including the circumstances in which the conduct occurred, the location of the conduct, the parties involved, and the manner of the conduct, the conclusion reached by Bartlet and his friends clearly sustained the jury's verdict in this case. Gonzalez showed a lack of foresight by posting the pictures in such an order and under such circumstances that a reasonable person would have concluded, as did Bartlet, that the social postings constituted a true threat. Simply put, as in *Minniecheske*, the pictures Gonzalez posted created the risk of imminent public disorder. Bartlet reasonably saw them as a possible threat, as did the responding officers. The possibility of a mass shooting occurring is a concern that many Americans must take seriously, and a common venue for such shootings are movie theatres.

II. THE GONZALEZ CONVICTION OF DISORDERLY CONDUCT DOES NOT VIOLATE ANY RIGHT AFFORDED GONZALEZ UNDER THE SECOND AMENDMENT OF THE U.S. CONSTITUTION OR SECTION 25 ARTICLE I OF THE WISCONSIN CONSTITUTION

Gonzalez argues, in the alternative that the disorderly conviction violated his Second Amendment rights to "keep and bear Arms", and accordingly, is unconstitutional. Again, Gonzalez's arguments are misplaced. Gonzalez, as well as all U.S. citizens, have a right to keep and bear Arms, but that right does not extend to the display of those Arms in a menacing or threatening manner as occurred in this case.

Gonzalez attempts to bolster this argument by asserting that the Circuit Court erred in not applying the *mens rea* burden which would have required the Town to prove that Gonzalez acted with criminal or malicious intent. This argument is premised upon a provision in Sec. 947.01(2), Wis. Stats., which provides as follows:

> Unless other fact and circumstances that indicate a criminal or malicious intent on the part of the person apply, a person is not in violation of, and may not be charged with a violation of, this section for loading a firearm, or for carrying or going armed with a firearm or knife, without regard to whether the firearm is loaded or the firearm or the knife is concealed or openly carried.

Gonzalez's arguments and reliance on Sec. 947.01(2), Wis. Stats. are misplaced for several reasons:

First, as discussed above, Gonzalez's "intent" is irrelevant in this case considering the ordinance and statute at issue. The citation issued to Gonzalez incorporated, by reference, the disorderly conduct provisions set forth in Sec. 947.01(1), Wis. Stats. Section 947.01(2), Wis. Stats. did not form the basis for issuance of the citation, and all arguments in reference to that statute are irrelevant.

Second, the constitutional protections and state statute relied on by Gonzalez in making this argument are completely inapplicable to the instant case and are cited in an attempt by Gonzalez to distract the Court from the applicable standard.

Gonzalez was not issued a citation for Disorderly Conducted based on his possession of a firearm. The mere fact that a firearm may have been included within the social media postings which, taken collectively as found by the jury constituted disorderly conduct, does not infringe on Gonzalez's constitutional right to bear arms, nor does it invoke the statutory protection requiring establishment of malicious intent as argued by Gonzalez.

Simply put, Gonzalez was issued a citation in this case because of his conduct and the totality of the circumstances including all of the photographs that he took and posted on social media accounts.

That conduct instilled fear in the minds of Bartlet and his friends, and that fear was of a level which caused Bartlet and his friends to flee from the theater fearing a mass shooting might occur. Neither the issuance of the citation, nor the circumstances giving rise to issuance of the citation involves any of the conduct described in Sec. 947.01(2), Wis. Stats., and accordingly, the arguments asserted by Gonzalez are without any relevance or merit.

CONCLUSION

For the reasons set forth above, and applying the applicable Standard of Review, the verdict returned by the jury in this case and the judgment entered by the Court must be sustained.

Dated this 24th day of June, 2021.

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CERTIFICATION

I certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced using the following font:

Proportional serif font: Min. printing resolution of 20 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of min. 2 points, maximum of 60 characters per full line of body text. The length of this Brief is 19 pages and 3,428 words.

Dated this 24th day of June, 2021

BY: _____
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CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)(f)

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 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 24th day of June, 2021.

Respectfully submitted,
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