STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II
Appeal No. 2021AP000218-CR

TOWN OF BROOKFIELD,
Plaintiff-Respondent,

-vs.-

MARTIN M. GONZALEZ,
Defendant-Appellant.

ON APPEAL FROM THE JUDGMENT OF CONVICTION FILED ON JANUARY 26, 2021 AND THE ORDERS DENYING DEFENDANT'S MOTIONS TO DISMISS, THE HONORABLE LAURA LAU PRESIDING, IN THE WAUKESHA COUNTY CIRCUIT COURT.
WAUKESHA COUNTY CASE NO. 2018CV002074

DEFENDANT-APPELLANT'S REPLY BRIEF

Respectfully submitted by:

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

ARGUMENT

I. THE TOWN CITES TO A LESSER CIVIL BURDEN OF EVIDENTIARY PROOF BUT FAILS TO ANALYZE THE HEIGHTENED CONSTITUTIONAL STANDARD OF REVIEW.

The Town correctly cites to the "clear, satisfactory and convincing" evidentiary burden needed for a conviction in a civil forfeiture matter. (Respondent Brief at 10). However, this evidentiary burden is a different concept altogether from the standard of review a court must engage in to determine whether the prosecution was constitutionally-permitted in the first place.

Gonzalez is challenging the disorderly conduct statute as unconstitutionally applied to him under the First and Second Amendments to the U.S. Constitution and the Wisconsin Constitution's equivalent sections. The constitutionality of a statute, as it applies to particular facts, is a question of law that this Court reviews de novo. *See* State v. Baron, 2009 WI 58, ¶10, 318 Wis. 2d 60, 769 N.W.2d 34. Further, the reviewing court should apply intermediate scrutiny. State v. Roundtree, 2021 WI 1, ¶3, 395 Wis. 2d 94, 952 N.W.2d 765. This is a

review to be done independently of the circuit court. Id. at ¶ 12.

The Town's failure to respond or analyze this case using the correct constitutional standard of review displays the weakness of their position. Instead, the Town provides a conclusory statement regarding Gonzalez's reliance upon criminal, not civil case law, but fails to enlighten the Court why that distinction is of constitutional importance. (Respondent's Brief at 7).

Plainly, when any government prosecution is undertaken because of an individual's exercise of his rights to speech and bearing arms, the standard of review of that prosecution does not change merely because the prosecution is for a forfeiture. The Town offers no case law supporting its position that a forfeiture action is subject to lesser constitutional scrutiny. The Town bears the burden to show its prosecution was constitutionally sound and has failed to do so. *See* State v. Robert T., 2008 WI App 22, ¶ 5, 307 Wis.2d 488, 746 N.W.2d 564.

II. THE TOWN CALLS FOR AN OBJECTIVE STANDARD AND A REVIEW OF THE "TOTALITY OF THE CIRCUMSTANCES" REGARDING ITS DECISION TO ISSUE A CITATION FOR DISORDERLY CONDUCT BUT FAILS TO ENGAGE IN MEANINGFUL ANALYSIS OF CASE FACTS.

Under either an objective speaker/listener or subjective speaker analysis, the Town did not have a constitutionally valid theory of prosecuting Gonzalez's speech. Gonzalez's speech was objectively benign and far from being a "true threat." In fact, the Town's own brief describes Gonzalez's speech as signaling a "chance" of violence or being a "possible threat." (Respondent's Brief at 5, 14). This is in addition to the "implied" or "vague" nature of the speech as admitted by the Town's primary witness. (R:34: 86-87; Ap-A. 74-75).

The Town's brief asks this Court to engage in a "totality of the circumstances" review of the case beyond Gonzalez's speech. (Respondent's Brief at 14). Mr. Gonzalez benefits from such a review and has similarly asked for a "contextual" consideration of his speech. (Petitioner's Brief at 20). The Town creates factors for this

Court to consider: the circumstances in which the conduct occurred, the location of the conduct, the parties involved, and the manner of the conduct, but then provides no review of these factors. (Respondent's Brief at 17).

An objective application of the Town's created factors are decidedly in Gonzalez's favor. First, the circumstances and manner of Gonzalez's speech are probative: his allegedly "otherwise disorderly" speech consisted of just four social media postings (in addition to two other Instagram Story postings that were not entered into evidence and were assumedly inoffensive and otherwise irrelevant). (R20; Ap-A. 42). The social media postings that provoked or tended to provoke disorder, a photo of a pistol and loaded magazine, were made on two completely separate and distinct platforms.

Of course, the most probative circumstances of the speech are the lack of a firearm in the theater, the lack of any menacing language in the social media posts, and the lack of any behavior in the theater during the playing of

Jumanji that would lead to any conclusions of an intended threat.

The location of the conduct is also probative, albeit problematic given the global reach of a social media post. Gonzalez was not sending a message specifically to any particular location. Instagram and Snapchat allow for location and account "tagging." Had Gonzalez wanted to connect his firearm and magazine photos to a particular place or business (such as the theater) or a particular individual (such as Bartelt) he could have done so. But instead, the speech was merely broadcast to his 300 social media followers – who also could have been located anywhere in the world.

The parties involved also provides important context. Unlike the defendant in State v. Schwebke, there was no backstory or prior course of conduct that heightened the potentially disturbing nature of his speech.[1] 2002 WI 55, 253 Wis.2d 1, 644 N.W.2d 666. In

[1] The Town also cites to State v. Minniecheske, 212 Wis. 2d 645, 570 N.W.2d 64 (Wis. Ct. App. 1997). The Town

fact, Bartelt only knew Gonzalez from youth baseball and both young men were ignorant of each other's presence at the theater. (R34:85-86; Ap-A. 73-74).

State v. Perkins offers another slate of factors that a reviewing court could consider in determining whether speech constitutes a "true threat:"

> (F)actors to be taken into consideration when making this determination (include): how the recipient and other listeners reacted to the alleged threat, whether the threat was conditional, whether it was communicated directly to its victim, whether the maker of the threat had made similar statements to the victim on other occasions, and whether the victim had reason to believe that the maker of the threat had a propensity to engage in violence.

State v. Perkins, 2001 WI 46, 31, 243 Wis. 2d 141 (*citing* United States v. Hart, 212 F.3d 1067, 1071 (8th Cir. 2000)).

Except for the reaction of Bartelt and the Town's police, all factors the Town asks the Court to consider weigh in Gonzalez's favor. While Bartelt and the Town police reacted in a manner consistent with a potential

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fails to alert the Court that this is an unpublished decision. Pursuant to Wis. Stat. 809.23(3) the decision is not citable and Gonzalez will therefore ignore it.

threat, Gonzalez's other approximately 299 social media contacts apparently did not perceive any threatening speech – and neither did the over 100 other *Jumanji* theatergoers.

Second, whether the "threat" was conditional is hard to analyze because Gonzalez's social media postings were facially not a threat– there was no way to assess whether there was any condition upon which the sinister assumption would be acted upon or not. The "chance," "possible," "implied" or "vague" perceived nature of the social media postings cuts against this factor in Gonzalez's favor.

The social media posts were not directed toward any particular person. Bartelt did not believe the postings were directed toward him. (R34:86-87; Ap-A. 74-75). No location or account "tagging" was done. Only the "random" circumstance of Bartelt opening of his social media during the showing of *Jumanji*, along with his and Gonzalez's "random" occurrence of being at the same 10 pm showing (only together in the theater

because both had missed an earlier showing) resulted in the perceived "implied" or "vague" threat being viewed by Bartelt. Also Bartlet's opening of the second social media account (SnapChat) created an additional serendipitous and unforeseeable circumstances of the social media postings ever being seen by someone who would then feel afraid.

Lastly, the Town and its witnesses offered no similar statements made to Bartelt or the theater (or anyone else) on other occasions and offered no other reason to believe that Gonzalez had a propensity to engage in violence.

The Town spends much of its brief arguing State v. Perkins, 2001 WI 46, 243 Wis. 2d 141 was not superseded by Virginia v. Black, 538 U.S. 343, 359, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003). The Supreme Court's language regarding subjective intent in matters of speech prosecution in Black was furthered by Justice Roberts' opinion in Elonis v. U.S., which the Town completely ignores in its brief. 575 U.S. 723 (2015). Elonis stands

broadly for the proposition that there must be some conscious wrong-doing on the part of the accused, despite no specific scienter/mens rea being present in the statutory language. Id. at 2009.

The instant facts are a model case to consider the necessity of a subject intent requirement when a statement is indisputably made without wrongful intent by the speaker and the statement is given a sinister, alternative meaning by unanticipated listeners. The reach of social media was not contemplated when Perkins was decided and the application of its holding must be considered in light of both the Supreme Court's guidance and recently developed transformative technologies. The Supreme Court's guidance in Black and Elonis should not be ignored simply because of their application to specific federal statutes.

Lastly, the Town's stance that Gonzalez's situation is akin to that of State v Schwebke is inapt. 2002 WI 55, 253 Wis.2d 1, 644 N.W.2d 666. The defendant in Schwebke sent numerous letters to his victim, her sister, and her ex-boyfriend. "The repeated mailings displayed

obsessive behavior on the part of Schwebke that he was observing every aspect of (the victim's) life." Id. at ¶32. This was not benign and unintentional behavior. Schwebke was intentionally provoking and disturbing his victims. There was no other rationale for his conduct. Such is not the case here.[2]

III. THE TOWN ONLY PROVIDES CONCLUSORY ARGUMENTS REGARDING GONZALEZ'S SECOND AMENDMENT RIGHT TO KEEP AND BEAR ARMS.

The Town fails to argue how Gonzalez's challenges to his prosecution as unlawful infringements of his right to keep and bear arms pursuant to the U.S. and Wisconsin Constitutions. The Town states:

[2] Contextual circumstances of speech are critical in determining whether the speech constitutes a "true threat." For instance, in the classic Brian DePalma film *The Untouchables* the gangster Frank Nitti's facially-benign statements to protagonist Elliot Ness "nice house," "nice to have a family," and "(a) man should take care to see nothing happens to them," were of course truly threatening given the context of the film. (Paramount Pictures Studios 1987)

> 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.

(Respondent's Brief at 16).

The Town's conclusionary statement, that Gonzalez wasn't cited for bearing a firearm, is preposterous. No police action would have occurred had Gonzalez posted a picture of a baseball mitt between the postings of the ticket and theater. It was solely the presence of a firearm and magazine within his social media postings that created the perceived "menacing or threatening" nature of the speech. (Respondent's Brief at 15).

Displaying a firearm on social media is a lawful purpose. Wisconsin Carry, Inc. v. City of Madison, 2017 WI 19, ¶10 373 Wis. 2d 543, 892 N.W.2d 233. This right does not extinguish if the display is done in proximity to

attending a movie in a theater, a college seminar, worshiping at a synagogue, or going to a dance club. The Town fails to articulate exactly how the sandwiching of the pistol and magazine photos between photos relating to the theater constitutes a "true threat." The trial record simply does not support the Town's argument that the pistol and magazine postings were in any way "menacing or threatening." (Respondent's Brief at 15). As noted, the Town's primary witness only calls the sequence an "implied" or "vague" threat. (R34: 86-87; Ap-A. 74-75).

Moreover, the Town's brief promises to provide "several reasons" why Wis. Stat. § 947.01(2) does not apply to this case. (Respondent's Brief at 15). But no reason is ever articulated. Gonzalez could not have depicted the pistol and magazine without "carrying or going armed" in order to take the photos and post them on social media. An arguable alternative, that Gonzalez did not carry or go armed, cuts against the Town's conclusion that the depicted firearm was to be used in some future violence at the theater. Wis. Stat. § 947.01(2)

applies and the jury should have been told of the requirement for malicious or criminal intent.

CONCLUSION

For the aforementioned reasons, Gonzalez asks this Court to vacate his municipal conviction and dismiss the prosecution against him, or in the alternative, to remand the case for a new trial with a properly instructed jury.

Dated this 9th day of July 2021.

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Electronically signed by:
Attorney Daniel M. Adams

RULE 809.19(8g)(a) CERTIFICATION

I certify that this brief conforms to the rules contained in Section 809.19(8)(b), (bm) and (c) for a brief. The length of this brief is 2498 words, as counted by the commercially available word processor Microsoft Word.

Dated this 9th day of July 2021.

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