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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT 4

Case No. 2019AP2339-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

SAMUEL M. POLHAMUS,

Defendant-Appellant.

**On Appeal from Jury Trial Order of
Hon'ble Radcliffe, Richard
Monroe County Case Number 2019CM000030
State of Wisconsin vs. Samuel Martin
Polhamus**

**BRIEF OF
APPELLANT SAMUEL M. POLHAMUS**

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I. ISSUE PRESENTED

A. Question is whether videotaping can be considered a threat and whether that conduct that would be intention to do harm.

II. STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not requested. It is anticipated that the issue will be sufficiently addressed in the briefs. Publication is not warranted because the issue raised involves the application of established legal principles to the facts of this case.

III. STATEMENT OF THE CASE

A simple fact of videotaping, when a person receives threats and feels great danger to life, health and safety; which he indeed suffered cannot be considered a

threat and that conduct cannot be construed as intention to do harm his aggressor/ assailant / assaulter.

IV. FACTS

Facts are very clear that this was a minor incident where in fact defendant took beating and suffered injuries. Following are factual excerpts from Jury Trial Transcripts:

A. Mr. Schodeberg Threw First Punch and Hit Defendant

Page 368-369¹ of Jury Trial Transcripts

Q Mr. Polhamus, the people at the bar, the bar patrons, they were bothered by you using the cell phone in their faces, weren't they?

A There was only two people that I put my cell phone in their faces and they assaulted me first - - or one assaulted me first. The other one announced that it was his intention to bring great peril to my life, health and safety.

¹ Appendix Page No. 112-113.

Now , if you don ' t want me to put my cell phone in your face , don't march up to me and get in my grill and tell me you ' re going to kick my ass . If you don't do that, you won't have to worry about me getting my cell phone out.

**B. Defendant Did Not Press Charges
Against Mr. Schodeberg**

Page 369² of Jury Trial Transcripts

Q Mr. Polhamus, when you had contact with law enforcement, you told them you didn't want to press any charges against Mr. Schodeberg for punching you; is that correct?

A That ' s correct.

**C. Defendant Did Not Make Any
Threats**

Page 375³ of Jury Trial Transcripts

MS. SKILES: It must have been Mr. Schodeberg, Judge.

THE COURT: And Mr. Schodeberg did testify that he felt threatened by the defen-dant putting the - - his cell phone in his face and videotaping him; however, **there wasn't any testimony that Mr. Polhamus made any threaten-ing comments.** So the question is really

² Appendix Page No. 113.

³ Appendix Page No. 114.

whether videotaping can be considered a threat and whether that's conduct that would be intention to do harm.

D. Defendant Disarmed Himself

Page 375⁴ of Jury Trial Transcripts

I can ' t find that - - while putting a video - - a video or a cell phone in some - body ' s face is certainly disarming and probably makes them uncomfortable and we've heard testimony about that, I can't find that it is a threat of intention to do harm to somebody.

So I don ' t believe that that portion of the jury instruction should be included. I'll strike that from the meaning of disorderly conduct.

E. Defendant Disarmed Himself Even When Allegedly Intoxicated but Was Suffering Concussion

Page 376⁵ of Jury Trial Transcripts

MS. SKILES: Just an addition request, Judge. I do not believe that instruction 201, opinion of a non - expert, is included. I would be asking that that be included as to the officer' s testimony that he believed

⁴ Appendix Page No. 114.

⁵ Appendix Page No. 115.

the defendant was intoxicated or impaired.

Page 414⁶ of Jury Trial Transcripts

It ' s - - the DA ' s flat out wrong, she got me totally wrong, and so I guess at this point I ' ve made my points the best I can. I think you understand that - - that - - if you recall correctly, I don ' t believe when I ' m videotaping these other folks just minutes before my interaction with the police that I do not sound intoxicated at all.

I think after that I do, but I think if you factor in the fact that I have freshly fattened lips and I ' m suffering a concussion, it's all very explainable.

F. Defendant Was Only Using Cell Phone to Protect Himself From Threat To His Life Health And Safety

Page 368-369⁷ of Jury Trial Transcripts

Q Mr. Polhamus, the people at the bar, the bar patrons, they were bothered by you using the cell phone in their faces, weren't they?

A There was only two people that I put my cell phone in their faces and they assaulted me first - - or one

⁶ Appendix Page No. 116.

⁷ Appendix Page No. 112-113.

assaulted me first. The other one announced that it was his intention to bring great peril to my life, health and safety.

Now , if you don ' t want me to put my cell phone in your face , don't march up to me and get in my grill and tell me you ' re going to kick my ass . If you don't do that, you won't have to worry about me getting my cell phone out.

Page 375⁸ of Jury Trial Transcripts

MS. SKILES: It must have been Mr. Schodeberg, Judge.

THE COURT: And Mr. Schodeberg did testify that he felt threatened by the defen - dant putting the - - his cell phone in his face and videotaping him; however, there wasn ' t any testimony that Mr. Polhamus made any threaten - ing comments. So the question is really whether videotaping can be considered a threat and whether that's conduct that would be intention to do harm.

I can ' t find that - - while putting a video - - a video or a cell phone in some - body ' s face is certainly disarming and probably makes them uncomfortable and we've heard testimony about that, I can't find that it is a threat of intention to do harm to somebody.

So I don ' t believe that that portion of the jury instruction should be

⁸ Appendix Page No. 114.

included. I'll strike that from the meaning of disorderly conduct.

Page 364-367⁹ of Jury Trial Transcripts

THE COURT: (Interrupting) Mr. Polhamus, I want you to take a deep breath. Okay. Just let that sink in for a minute and try to listen to the question and just answer her question.

Okay. So go ahead and - - and finish. The question was what did you contribute to the situation?

A I contributed to being in the wrong spot in the wrong place on July 14th whereby some bad employees with the Monroe County Police Department put me in a position - -

MS. SKILES: (Interrupting) Ob-jection. Objection.

THE COURT: Hang on. Mr. Polhamus, your comments are inappropriate, they 're stricken from the record.

What we 're talking about, Mr. Polhamus, is what happened on January 19th I believe, that 's Friday, January 18th, into the early morning hours of Friday (sic), January 19th.

And go ahead and ask your next question. I don't think he responded to the last one, so you can ask another question.

Q Mr. Polhamus, just what did you do to contribute to this situation?

A What did I do to contribute to the situation? Would have, could have, should have. I could Monday

⁹ Appendix Page No. 108-111.

morning quarterback this thing all day long.

Okay. I ' ve never been in a position before where I ' ve had to all of a sudden realize if I go to neutralizing threats so I don ' t have to - -

Q (Interrupting) Mr. Polhamus, I don ' t mean to be rude and cut you off , but the bottom line here is I asked you a very specific question and you ' re not answering my question, and I really just need you to answer my question.

You contributed to this situation because you were loud in these establishments, weren't you?

A Because I was allowed in these establishments?

Q You were loud, you used loud language, you used boisterous language, right?

A Only after I ' d been attacked.

Q You used profanity?

A Profanity was used on me.

Q You used the F word as we ' ve heard on the videos, right?

A Again, I have done my best to inform you that it was my plan to play in the same sand box they ' re playing in; to let them know that if they think they ' re crass , I ' m crass ; if they think they can bark loud, I can bark loud ; if they think they can bite , I can bite. That is my plan to avoid trouble.

Could have, should have, would have, Monday morning quarterback it all you want. I ' ve never been placed in this position before. I ' ve never

had a chance to practice how do you get people who have shown they want to bring grave peril to your life, health and safety.

How do you show them that you have abandoned your previously well - enjoyed ability to neutralize threats that are brought against you. That now the better, the smarter option because I ' m out on bond and because I have had vast experience of how police handle alter - cations at bars , is to make a conscious de - cision that I ' m smarter to take a beating than I am to neutralize threats.

Q And in the past you said that you would fight back; is that correct?

A Would have, could have, should have. I like the True Grit line of, " I find real life vexing enough - - . " THE REPORTER: I ' m sorry. You find what?

A I ' m sorry. I ' d like to quote from the movie True Grit whereby I find the merchant horse trader says, " I find real life vexing enough without entertaining hypotheticals. " We'll never know how this would have turned out if I wasn't out on a signature bond; however, I would like to guarantee you this, if I felt my life, health and safety were in grave peril, I don ' t think I would have gotten really close to the people who I felt were going to hit me and I don't think I would have tied up one of my defense mechanisms with a phone .

**G. Court Disallowed Defendants'
Medical Condition**

Page 307¹⁰ of Jury Trial Transcripts

MR. POLHAMUS: Well, I would certainly like for the jury to know that I have witnessed people in the aftermath of concussions numerous, numerous times. I can tell you that I've left people in awe with a prognosis once I've made the diagnosis of a concussion.

THE COURT: And I'm not going to allow you to testify about that, Mr. Polhamus, and here's why. You're not a medical expert, so you're not providing an opinion that's based on a medical diagnosis. You're giving an opinion.

Page 414¹¹ of Jury Trial Transcripts

It's -- the DA's flat out wrong, she got me totally wrong, and so I guess at this point I've made my points the best I can. I think you understand that -- that -- if you recall correctly, I don't believe when I'm videotaping these other folks just minutes before my interaction with the police that I do not sound intoxicated at all.

I think after that I do, but I think if you factor in the fact that I have freshly fattened lips and I'm

¹⁰ Appendix Page No. 107.

¹¹ Appendix Page No. 116.

suffering a concussion, it ' s all very explainable.

H. Trouble Followed Defendant

Statement of State witness Jacob Ludovice:

Page 144¹² of Jury Trial Transcripts

Q What did he tell you?

A He said after he was asked to leave The Hangout, he walked to the Amber Inn. At that point he was - - he stated he was video - taping people with his phone.

At that point he said he was attacked by an unknown assailant, which I observed some injuries to his face. Mr. Polhamus said that he didn ' t want to pursue any charges in that matter, he would take it up civilly, denied any medical attention, essentially just summarized what occurred before he stepped outside with me.

Q Did he tell you why he was video - taping people?

A I think he was upset from the incident that occurred at The Hangout and that it spilled over into the Amber Inn.

I. DAs' Real Intention

By Tentative pre-trial offer

03/12/2019, DAs' real intention was

to get Defendant to plead guilty to another case:

8CM353 • PLEAD (Guilty/No Contest)
TO: Count 2 (drug para). Dismiss and read-in Count 1 (THC) and Count 3 (illegally obtained prescription).
Sentencing Recommendation: pay \$100 fine plus costs.

19CM30 Dismiss and read-in to 18CM353

This offer is contingent on the defendant withdrawing suppression motion in 18CM353 by Tuesday, March 19, 2019.

Reasons for Offer:

D is 56. No criminal history. Had prior drug para citation dismissed in exchange for plea to traffic matter here in Monroe County. In 18CM353 (July 14, 2018), P had THC and Viagra in his car. In 19CM30 (January 19, 2019), D was involved in an incident at a bar. D appeared highly intoxicated.

V. ARGUMENT

A. Videotaping Cannot Be Considered A Threat

The disorderly conduct statute, WIS. STAT. § 947.01, provides:

¹² Appendix Page No. 106.

"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." The elements of disorderly conduct are: (1) The defendant engaged in (violent) (abusive) (indecent) (profane) (boisterous) (unreasonably loud) (or otherwise disorderly) conduct; and (2) The conduct of the defendant, under the circumstances as they then existed, tended to cause or provoke a disturbance. WIS JI - CRIMINAL 1900.

Bar/ establishment was recording [with/without consent] via surveillance camera which was in fact produced as evidence [Samuel was not aware of it.]

Samuel felt threatened and started recording the verbal and physical assault he received. His action was not a threat to anyone.

This act of videotaping is no where defined as "disorderly conduct" in the above statute.

To extract guilty plea from Samuel in previous pending case Prosecution went overboard in its discretion.

The crime has two elements: (1) "the conduct must be of the type enumerated in the statute or similar thereto in having a tendency to disrupt good order," and (2) "the conduct must be engaged in under circumstances which tend to cause or provoke a disturbance." City of Oak Creek v. King, 148 Wis. 2d 532, 540, 436 N.W.2d 285 (1989.)

There was no good "order" in the bar at that time of night. Everybody was drunk and picking up fight with "Samuel." Samuel did not disrupt any good order, in fact Samuel was himself victim of bad conduct of other patrons.

Thus, rather than attempting to enumerate "the limitless number of antisocial acts which a person could engage in that would menace, disrupt, or destroy public order," § 947.01 "proscribes conduct in terms of results which can reasonably be expected therefrom." King, 148 Wis. 2d at 541.

Whether conduct is disorderly depends upon the surrounding circumstances; "what would

constitute disorderly conduct in one set of circumstances, might not under some other." State v. Elson, 60 Wis. 2d 54, 60, 208 N.W.2d 363 (1973.)

State v. Eggum, Appeal No. 2016AP2036-CR, at *8-9 (Wis. Ct. App. Nov. 8, 2017.)

To satisfy the first element, the State alleges in its petition that A.S.'s statements were "abusive and otherwise disorderly conduct." Wisconsin appellate courts have not directly addressed what is meant by abusive conduct. However, they have considered what constitutes "otherwise disorderly conduct" in several cases. Here, we need not determine if A.S.'s threats constitute abusive conduct because we conclude that his threats could be determined to be otherwise disorderly conduct. In the Interest of A.S., 99-2317, No. 99-2317, at *1 (Wis. Ct. App. Mar. 2, 2000.)

Here it is a matter of record that Samuel never threatened anyone. He himself felt threatened and started recording for evidence. [See Page 375 of Jury Trial Transcripts.]

**B. Defendants Videotaping Would Not
Be Intention to Do Harm**

The second element of disorderly conduct requires that the conduct be of the type which "tends to cause or provoke a disturbance...." See **Wis. Stat. § 947.01.**

In determining what conduct satisfies this element, the supreme court has looked to both the actual effect and the potential effect that the conduct had on others.

For example, in **Elson**, 60 Wis.2d at 66, 208 N.W.2d at 370, the court upheld a jury verdict which found that an attorney, who refused to leave a mental ward until he saw his client, exhibited conduct that tended to cause or provoke a disturbance. The court noted that numerous patients were gathering in response to the attorney's arguments and refusals to leave the ward.

Here, none of Samuels' action was capable to cause or provoke a disturbance. State Exhibit Video is clear that Samuel tried his best to avoid any conflict, Samuel did not start fight, Samuel did not hit first, Samuel tried to get away from the assaulter by getting behind the counter.

The only possible mistake Samuel did is that he is a good person and Christian at heart. He immediately forgave his accuser and declined to press charges.

VI. CONCLUSION

Therefore, as explained above, Samuel did not commit the crime of 947.01(1) "disorderly conduct." His conviction must be set aside.

Dated this August 20, 2020.

Respectfully submitted

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CERTIFICATION AS TO FORM/LENGTH

I certify that 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 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 2990 words.

Dated this August 20, 2020.

Signed:



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**CERTIFICATE OF COMPLIANCE
WITH 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 § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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 August 20, 2020.

Signed:



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