COURT OF APPEALS
DECISION
DATED AND FILED

July 3, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP2516-CR **Cir. Ct. No. 2012CM192**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

THOMAS G. SMITH,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Iowa County: WILLIAM D. DYKE, Judge. *Reversed and cause remanded with directions*.

¶1 LUNDSTEN, J.[1] Thomas Smith appeals a judgment convicting him, after a jury trial, of disorderly conduct and unlawful use of a computerized

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

communication system. The convictions for these misdemeanor crimes were based on two comments Smith posted on a police department Facebook page. Smith argues that the circuit court should have granted his motion to dismiss because his Facebook comments were protected speech. The State argues that the comments are not protected speech because they are "fighting words." The State does not persuade me that Smith's comments can reasonably be construed as fighting words. And, the State's briefing provides no other basis on which to uphold Smith's convictions. Accordingly, I reverse and remand for the circuit court to vacate the judgment and dismiss the charges against Smith.

Background

¶2 On July 20, 2012, the Village of Arena police department posted a status update on its official Facebook page:

> We would like to thank the citizens … that assisted the Arena Police Department in attempting to locate two out-of-state juvenile males. The juveniles ran from a Sharon Street address after an officer attempted to make contact with them …. The same two males along with a third local juvenile male were also arrested later the same evening for burglary of a business …. Two of the males were detained by residents until law enforcement arrived, the third male was located and arrested a short time later ….

¶3 Within the next 24 hours, several Facebook users posted comments on the police Facebook page. Some of the users appeared to have knowledge or opinions, or both, about the underlying facts of the arrests. The comments included:

> Thanks for searching my house and accusing me of harboring so called dangerous fugitives … and since when is it ok for a resident to point a gun at a couple [o]f KID'S [sic] heads? If that was anyone else's kids pretty sure it would be a big deal. Oh wait though, they were black so

> [i]t's ok. Thanks to everyone that made our town look like nothing but a racist, prejudice[d] place to live. I'm embarrassed to say I'm part of that kind of community. If I were black I'd run too.
>
> And don't anybody say it isn't about race because it is when I ask the cop specifically what they look like and his response is they will stand out because they don't belong here[.]
>
> Sooo happy I left that town.
>
> Good thing the s[c]enario didn't go down in my hood it would have ended a lot differently … bang sheee bang[.]

¶4 Smith posted two comments, subsequent to those quoted above, which read:

> Fuck the fucking cops they ant shit but fucking racist basturds an fucking all of y'all who is racist[.]
>
> Fuck them nigers policy bitchs wat the you got on us not a darn thing so fuck off dicks[.]

There was no allegation, and no evidence at trial, that Smith was in physical proximity to Arena police when he posted his comments.

¶5 Based on Smith's comments, the State charged Smith with disorderly conduct and with unlawful use of a computerized communication system. *See* WIS. STAT. §§ 947.01 and 947.0125(2)(c).[2] Before trial, Smith

[2] The statutes under which Smith was convicted provide, in pertinent part:

> **947.01 Disorderly conduct. (1)** 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.
>
> **947.0125 Unlawful use of computerized communication systems.**...

(continued)

moved to dismiss the charges on First Amendment grounds. In opposing Smith's motion, the State argued that Smith's Facebook comments were not protected speech because they were fighting words. The circuit court denied Smith's motion.

¶6 At trial, after the close of the State's evidence, Smith again moved to dismiss, and the circuit court denied the motion. The jury found Smith guilty on both counts.

Discussion

¶7 Broadly speaking, the parties agree that the question on appeal is whether the statutes under which Smith was prosecuted were unconstitutionally applied to Smith in violation of his First Amendment rights. They also agree that the State has the burden to show beyond a reasonable doubt that the application of the statutes to Smith is constitutional. *See* ***State v. Baron***, 2009 WI 58, ¶10, 318 Wis. 2d 60, 769 N.W.2d 34; ***State v. Weidner***, 2000 WI 52, ¶7, 235 Wis. 2d 306, 611 N.W.2d 684 ("[W]hen a statute infringes on rights afforded by the First Amendment, … the State shoulders the burden of proving the statute constitutional

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> **(2)** Whoever does any of the following is guilty of a Class B misdemeanor:
>
> ….
>
> (c) With intent to frighten, intimidate, threaten or abuse another person, sends a message to the person on an electronic mail or other computerized communication system and in that message uses any obscene, lewd or profane language or suggests any lewd or lascivious act.

We cite to the current versions of the statutes, which have not materially changed since the time of Smith's comments.

beyond a reasonable doubt."). My review of this question is de novo. *See* ***Weidner***, 235 Wis. 2d 306, ¶7.

¶8 The parties further agree that the more specific question here is whether Smith's comments constituted fighting words so that those comments are not entitled to First Amendment protection. The State does not argue that there is any other basis on which Smith's convictions based on his Facebook comments might be upheld consistent with First Amendment protections. For the reasons that follow, I agree with Smith that his comments cannot be construed as fighting words.

¶9 As an initial matter, I observe that the parties do not appear to make a distinction between Smith's pretrial motion to dismiss and his motion to dismiss after the close of the State's evidence at trial. So far as I can tell, the parties' approach is a logical one because the pertinent facts are undisputed, and the parties agree that the fighting words issue in this case should be decided as a matter of law. Regardless, my analysis below supports the conclusion that no reasonable fact finder could conclude on this record that Smith's Facebook comments were fighting words.[3]

¶10 The seminal fighting words case is ***Chaplinsky v. New Hampshire***, 315 U.S. 568 (1942). In ***Chaplinsky***, the defendant (Chaplinsky) was distributing literature on city streets when local citizens complained to the city marshal that Chaplinsky was denouncing religion as a "racket." ***Id.*** at 569-70. An unspecified "disturbance" occurred, and, as an officer escorted Chaplinsky to the station,

[3] After denying Smith's motions to dismiss, the circuit court also denied Smith's alternative request that the jury be instructed on fighting words.

Chaplinsky encountered the marshal and directed the following words at him: "'You are a God damned racketeer' and 'a damned Fascist and the whole government of [this city] are Fascists or agents of Fascists.'" ***Id.*** at 569. The Court in ***Chaplinsky*** concluded that Chaplinsky's comments were fighting words that were not entitled to First Amendment protection. ***Id.*** at 572-73. The Court explained:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. "Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument."

Id. at 571-72 (footnotes and quoted source omitted).

¶11 Although this definition of fighting words from ***Chaplinsky*** does not necessarily appear limited to situations in which the speaker and listener are in physical proximity, Smith argues that "remote" communications like his do not fall within ***Chaplinsky***. He argues, as I understand it, that remote communications generally cannot be fighting words because they have no similar tendency to incite an immediate breach of the peace by provoking the listener to immediate action against the speaker. Smith asserts that courts have declined to apply the fighting words doctrine outside of the face-to-face context.

¶12 The State concedes that "other states have declined to apply the fighting words doctrine in instances not involving such immediate contact." The State nonetheless argues that Smith's particular Facebook comments are fighting words.

¶13 I will address the State's more specific arguments below, but I first pause to laud the parties' efforts in locating and addressing fighting words cases from other jurisdictions. Those cases, combined with my non-exhaustive research, convince me that Smith's argument is persuasive and that the State's concession is apt. As far as I can tell, ***Chaplinsky*** has rarely if ever been applied outside of the face-to-face context.[4]

¶14 Of particular note is a recent Montana Supreme Court decision, ***State v. Dugan***, 303 P.3d 755 (Mont.), *cert. denied*, 134 S. Ct. 220 (2013). The ***Dugan*** court observed that the United States Supreme Court has not, since ***Chaplinsky***, upheld a conviction on fighting words grounds. ***Dugan***, 303 P.3d at 762. The court in ***Dugan*** further explained that other courts have "refused to extend [the concept of fighting words] beyond face-to-face communication" and have even refused to apply the doctrine "when the communication occurs in person but the speaker and the addressee are not in close physical proximity." ***Id.*** at 766.

¶15 After a review of authorities, the ***Dugan*** court concluded that there was no basis to extend the fighting words doctrine beyond its traditional application in face-to-face communications. ***Id.*** at 769; *see also, e.g.*, ***Anniskette v. State***, 489 P.2d 1012, 1013-15 (Alaska 1971) (no fighting words when speaker

[4] Neither the parties nor I have located a Wisconsin case that provides meaningful guidance given the facts here.

called a state trooper a "no good goddam cop" over the phone); ***Citizen Publ'g Co. v. Miller***, 115 P.3d 107, 113 (Ariz. 2005) ("The fighting words doctrine has generally been limited to 'face-to-face' interactions."); ***In re Welfare of S.L.J.***, 263 N.W.2d 412, 415, 420 (Minn. 1978) (no fighting words when a teenaged suspect yelled "fuck you pigs" at police officers after being released by the officers and while walking away from them); ***State v. Drahota***, 788 N.W.2d 796, 804 (Neb. 2010) ("[E]ven if a fact finder could conclude that[,] in a face-to-face confrontation, [insulting emails] would have provoked immediate retaliation, [the recipient of the emails] could not have immediately retaliated."); ***State v. Authelet***, 385 A.2d 642, 649 (R.I. 1978) ("Unless there is personally abusive language which is likely to lead to imminent retaliation in a face-to-face encounter, words cannot be proscribed under ***Chaplinsky's*** fighting words approach."); ***City of Seattle v. Huff***, 767 P.2d 572, 574 (Wash. 1989) ("The distance the telephone necessarily puts between the caller and the listener inherently tends to prevent immediate breaches of the peace which could more readily result from a face-to-face encounter.").

¶16 Given this case law, I fail to see how Smith's Facebook comments can properly be labeled fighting words.

¶17 The State appears to argue that Smith's use of a misspelled racial slur ("niger") was intended to describe the police and that directing this racial slur at police supports a conclusion that Smith's comments are fighting words because those comments have a tendency to incite the police to violence. I disagree. First, a reasonable reader of Smith's disjointed words would wonder who Smith meant to label with the slur. Second, the State's authorities in support of this argument each involve situations in which the slur was directed at the recipient *in person*. *See* ***In re Shane E.E.***, 48 A.D.3d 946, 946-47, 851 N.Y.S.2d 711 (N.Y. App. Div.

2008); ***In re Spivey***, 480 S.E.2d 693, 695, 698-99 (N.C. 1997); ***Cruff v. H.K.***, 778 N.W.2d 764, 766-67, 769-70 (N.D. 2010).

¶18 The State also argues that, given the context of Smith's Facebook comments, his comments had a tendency to incite an immediate breach of the peace even though they were not made in person. *See* ***Chaplinsky***, 315 U.S. at 572. The State argues that the pertinent context is that Smith's comments were "directed … towards the officers of the Arena police department, and fresh on the heels of a racially charged and dangerous situation in the community." For support, the State points to evidence that the juveniles the police arrested were black and were detained at gunpoint by private citizens until the police arrived. As best I can tell, this amounts to an alternative argument that Smith's comments are fighting words because they have a tendency to incite others to violence directed toward the police. If the State means to make this argument, I am not persuaded.

¶19 I agree with the State that context matters, but the facts of this case do not persuade me that Smith's comments had a tendency to incite an immediate breach of the peace by others against the police. The State's argument and supporting evidence are simply too vague as to who Smith's comments would have incited and what immediate breach of the peace might have resulted. Moreover, if the State means to argue that Smith's comments may have incited others to violence against the police, this seems to implicate a related but different test under ***Brandenburg v. Ohio***, 395 U.S. 444 (1969). *See* ***id.*** at 447 ("[C]onstitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."). In this regard, I note that the State does

not present developed argument and, even if it had, I see no apparent reason that it would have prevailed.

¶20 In rejecting the State's arguments, I need not and do not conclude that on-line communications could never be fighting words. However, I see nothing in the State's briefing or in the facts here that would allow me to apply ***Chaplinsky*** beyond its usual reach to conclude that Smith's Facebook comments are fighting words.

Conclusion

¶21 In sum, for the reasons stated, I reverse and remand for the circuit court to vacate the judgment of conviction and dismiss the charges against Smith.

By the Court.—Judgment reversed and cause remanded with directions.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)4.