Appeal No. 2020AP704 **Cir. Ct. No. 2019CV1350**

WISCONSIN COURT OF APPEALS
DISTRICT II

DANIEL DOUBEK,

PETITIONER-APPELLANT,

V.

JOSHUA KAUL,

RESPONDENT-RESPONDENT.

FILED

Mar 31, 2021

Sheila T. Reiff
Clerk of Supreme Court

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Reilly, P.J., Gundrum and Davis, JJ.

Pursuant to WIS. STAT. RULE 809.61, this appeal is certified to the Wisconsin Supreme Court for its review and determination.

ISSUE

Are ***Evans v. DOJ***, 2014 WI App 31, 353 Wis. 2d 289, 844 N.W.2d 403, and ***Leonard v. State***, 2015 WI App 57, 364 Wis. 2d 491, 868 N.W.2d 186, "good law" in light of the United States Supreme Court's decision in ***United States v. Castleman***, 572 U.S. 157 (2014)?

BACKGROUND

WISCONSIN STAT. § 175.60(3)(b) (2017-18)[1] and 18 U.S.C. § 922(g)(9) collectively prohibit a person from obtaining a concealed carry weapons (CCW) license if that person has been convicted of a "misdemeanor crime of domestic violence." The record in this case includes a September 1993 criminal complaint charging Daniel Doubek in count one with the misdemeanor offense of having "engage[d] in violent, abusive and otherwise disorderly conduct … contrary to WIS. STAT. § 947.01." A judgment of conviction included in the record indicates that in November 1993 Doubek pled to and was convicted of "Disorderly Conduct," in violation of § 947.01. In September 2019, the Wisconsin Department of Justice (the department) revoked Doubek's previously issued CCW license based on its conclusion that Doubek's disorderly conduct conviction was a conviction for a "misdemeanor crime of domestic violence."

In October 2019, Doubek filed the current petition challenging the revocation. The circuit court denied the petition based on its similar conclusion that Doubek "was convicted of a misdemeanor crime of domestic violence." The court relied upon our decisions in ***Evans***, 353 Wis. 2d 289, ¶15, and ***Leonard***, 364 Wis. 2d 491, ¶22, which instruct that because of the "violent" component, a disorderly conduct conviction for "violent, abusive and otherwise disorderly conduct" (***Evans***) or "violent, boisterous, and otherwise disorderly conduct" (***Leonard***) necessarily constitutes a conviction for a misdemeanor crime of domestic violence. Doubek appeals.

[1] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

DISCUSSION

Under federal law, it is "unlawful for any person … who has been convicted … of a misdemeanor crime of domestic violence … [to] possess … any firearm or ammunition." 18 U.S.C. § 922(g)(9). Because of this, a person may not obtain a CCW license in Wisconsin if he/she has been convicted of a "misdemeanor crime of domestic violence." *See* WIS. STAT. § 175.60(3)(b). As relevant to this case, a "misdemeanor crime of domestic violence" is a misdemeanor that "has, as an element, the use or attempted use of physical force" "committed by a person who has a specified domestic relationship with the victim." 18 U.S.C. § 921(a)(33)(A); ***United States v. Hayes***, 555 U.S. 415, 426 (2009).

Whether Doubek's 1993 disorderly conduct conviction constitutes a misdemeanor crime of domestic violence, thereby justifying the department's revocation of Doubek's CCW license, turns upon whether the conviction had "the use or attempted use of physical force" as an element. *See* 18 U.S.C. § 921(a)(33)(A). As they relate to this question, our decisions in ***Evans*** and ***Leonard*** appear at odds with the Supreme Court's decision in ***Castleman***, 572 U.S. at 162-63. While ***Castleman*** was issued one month after ***Evans***, because ***Leonard***, which interpreted ***Castleman*** and reaffirmed ***Evans***, was issued after ***Castleman***, we are bound by ***Leonard*** and ***Evans***. *See* ***State v. Brienzo***, 2003 WI App 203, ¶14, 267 Wis. 2d 349, 671 N.W.2d 700; *see also* ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997).

The defendants in ***Evans*** and ***Leonard*** were convicted of disorderly conduct, pursuant to WIS. STAT. § 947.01, for "violent, abusive and otherwise disorderly conduct," ***Evans***, 353 Wis. 2d 289, ¶12 & n.3, and "violent, boisterous,

and otherwise disorderly conduct," ***Leonard***, 364 Wis. 2d 491, ¶22. Rightly or wrongly, we held in ***Evans*** that "violent, abusive and otherwise disorderly conduct" constitutes an "element" of the crime of disorderly conduct. ***Evans***, 353 Wis. 2d 289, ¶¶12, 15, 20. We also held, without citation to any authority, that the "'violent' conduct" part of this "element" "necessarily implies the use of physical force," ***id.***, ¶12, and thus, that Evans' conviction for "violent, abusive *and* otherwise disorderly conduct" had "as an element" "the use of physical force," which is necessary for a "misdemeanor crime of domestic violence," ***id.***, ¶¶2, 12, 15 (emphasis added; citation omitted). In ***Leonard***, we specifically relied upon ***Evans***' holding that the "'violent' conduct" part of a disorderly conduct conviction "'necessarily implies' the use of physical force." ***Leonard***, 364 Wis. 2d 491, ¶22 (citation omitted).

Based upon ***Evans*** and ***Leonard***, the circuit court here understandably felt bound to conclude that Doubek's 1993 disorderly conduct conviction, charged as "violent, abusive and otherwise disorderly conduct," had "as an element, the use or attempted use of physical force," that the offense thus constituted a misdemeanor crime of domestic violence, and that the department thus properly revoked Doubek's CCW license. As indicated, we too are bound by our holding in ***Evans*** that "violent, abusive and otherwise disorderly conduct" constitutes an "element" of the crime of disorderly conduct, our ***Evans*** and ***Leonard*** holdings that the "violent" conduct part of this element "necessarily implies the use of physical force," and that a conviction for such constitutes a misdemeanor crime of domestic violence. *See* ***Cook***, 208 Wis. 2d at 189-90. We believe, however, that ***Evans***, 353 Wis. 2d 289, ¶12, and ***Leonard***, 364 Wis. 2d 491, ¶¶21-22, conflict with ***Castleman***, 572 U.S. at 162-63.

We agree of course with our holding in ***Evans***, that a disorderly conduct conviction for "violent, abusive *and* otherwise disorderly conduct" necessarily means that the defendant was convicted of "violent ... conduct." *See* ***Evans***, 353 Wis. 2d 289, ¶¶12, 15 (emphasis added; citation omitted). Where ***Evans*** and ***Leonard*** falter is that a defendant's conviction for "violent … conduct" does not necessarily mean the defendant used "physical force," as that term is defined by ***Castleman***.

Castleman holds, for purposes of 18 U.S.C. § 921(a)(33)(A) and 18 U.S.C. § 922(g)(9), that "physical force" requires at least some "offensive touching" of the victim. ***Castleman***, 572 U.S. at 167; *see also* ***Voisine v. United States***, 136 S. Ct. 2272, 2279-80 & n.4 (2016) (explaining that ***Castleman*** "interpret[ed] 'force' in § 921(a)(33)(A) to encompass any offensive touching"). ***Leonard***, however, holds that a defendant's conduct may be "violent" for purposes of a WIS. STAT. § 947.01 conviction even if he or she never actually touches, or even attempts to touch, the victim as the defendant in ***Leonard*** never made or attempted to make physical contact with the victim (his wife), yet he was convicted of committing "violent, boisterous, and otherwise disorderly conduct." *See* ***Leonard***, 364 Wis. 2d 491, ¶¶6-7. According to the complaint and plea transcript, Leonard's "violent, boisterous, and otherwise disorderly conduct" underpinning the disorderly conduct conviction was "kick[ing] in the locked door of his residence," which scared his wife. ***Id.***

Relatedly, while we recognized in ***Leonard*** that "***Castleman*** does suggest that crimes in which no force was directed at a person do not qualify as misdemeanor crimes of domestic violence for purposes of 18 U.S.C. § 922(g)(9)," we went on to hold that "physical force against an inanimate object" alone (the door), with no actual or attempted physical contact with the victim, "can ...

qualify" as "use or attempted use of physical force" so long as the force used *against the object* was "directed at" the victim "in the sense that it was part of a course of conduct directed at *frightening and intimidating*" the victim. *See* ***Leonard***, 364 Wis. 2d 491, ¶¶28-31 (emphasis added). We believe this holding conflicts with ***Castleman***.

The issue before the ***Castleman*** Court was whether mere offensive touching—"the degree of force that supports a common-law *battery* conviction"—amounts to "physical force" under 18 U.S.C. § 921(a)(33)(A).[2] ***Castleman***, 572 U.S. at 168 (emphasis added). In addressing that issue, the Court made clear, through all the examples it referenced as well as the language it chose in its holding, that the victim of the event at issue needed to have been "touched," at least to some degree, either directly by the perpetrator or through the perpetrator causing an object to make contact with the victim.[3] *See* ***id.*** at 170-71. It follows

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[2] "'[P]hysical force' is simply 'force exerted by and through concrete bodies,' as opposed to 'intellectual force or emotional force.'" ***United States v. Castleman***, 572 U.S. 157, 170 (2014) (citation omitted).

[3] The ***Castleman*** Court held that "Congress incorporated the common-law meaning of 'force'—namely, *offensive touching*—in [18 U.S.C.] § 921(a)(33)(A)'s definition of a 'misdemeanor crime of domestic violence,'" ***Castleman***, 572 U.S. at 162-63 (emphasis added), adding that "it makes sense for Congress to have classified as a 'misdemeanor crime of domestic violence' the type of conduct that supports a common-law *battery* conviction," ***id.*** at 164 (emphasis added). In discussing "[m]inor uses of force," the Court noted that the accumulation of acts such as "a squeeze of the arm [that] causes a bruise" over time "can subject one intimate partner to the other's control," and then stated, "[i]f a seemingly minor act like this draws the attention of authorities and leads to a successful prosecution for a misdemeanor offense, it does not offend common sense or the English language to characterize the resulting conviction as a 'misdemeanor crime of domestic violence.'" ***Id.*** at 165-66 (second alteration in original). The Court emphasized that it was construing "the operative phrase" of "physical force," noting that "physical force" "has a presumptive common-law meaning"—that meaning being "offensive touching." ***Id.*** at 163, 166. Considering legislative history, the Court observed that 18 U.S.C. § 922(g)(9)

(continued)

from ***Castleman*** that where 18 U.S.C. § 921(a)(33)(A) states that to constitute a misdemeanor crime of domestic violence the crime of conviction must "ha[ve], as an element, the use or attempted use of physical force," this necessarily means that there had to be an offensive touching or attempted touching of the victim by the defendant. *See* ***Castleman***, 572 U.S. at 170-71.

In this case, count one of the complaint indicates Doubek was charged with "violent, abusive and otherwise disorderly conduct," and the judgment of conviction indicates he was convicted of "Disorderly Conduct." If we assume Doubek pled to count one as charged, we can conclude he pled to having engaged in "violent … conduct." Because ***Evans*** and ***Leonard*** hold that the "violent … conduct" "element" of WIS. STAT. § 947.01 "necessarily implies the use of physical force," Doubek's § 947.01 conviction would then "necessarily" mean he was convicted of a crime that has "the use of physical force" as an

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> originally barred gun possession for any "crime of domestic violence," defined as any "felony or misdemeanor crime of *violence*, regardless of length, term, or manner of punishment." Congress rewrote the provision to provide the use of physical force in response to the concern "that the term crime of *violence* was too broad, and could be interpreted to include an act such as cutting up a credit card with a pair of scissors." Castleman would have us conclude that Congress thus meant "to narrow the scope of the statute to convictions based on especially severe conduct." But all Congress meant to do was address the fear that § 922(g)(9) might be triggered by offenses in which no force at all was directed at a person.

Castleman, 572 U.S. at 172 (emphasis added; citations omitted). The Court concluded that even a "slight[] offensive touching" would meet the definition of "use ... of physical force" for purposes of § 922(g)(9)(A). ***Castleman***, 572 U.S. at 163 (citation omitted). The entire context of the discussion by the ***Castleman*** Court makes it clear that there does need to be actual contact/touching between the defendant and the victim to constitute "physical force" and be considered a misdemeanor crime of domestic violence under this federal statute. *See* ***id.*** at 162-70.

element and thus that he committed a misdemeanor crime of domestic violence and is not eligible for a CCW license. Contradictorily, however, under ***Leonard***, "violent conduct" also could be conduct in which no touching or even attempted touching occurs at all. This type of "violent conduct" would not constitute "the use of physical force" under the ***Castleman*** definition, and thus the ***Evans*** and ***Leonard*** holding that "violent ... conduct" "necessarily implies the use of physical force" for purposes of 18 U.S.C. § 921(a)(33)(A) is contrary to ***Castleman***.[4]

Relying on ***Evans***, ***Leonard*** holds that a conviction for "violent" disorderly conduct "necessarily implies" that a defendant was convicted of a misdemeanor offense that has "the use of physical force" "as an element," making the defendant ineligible for a CCW license. At the same time, however, ***Leonard*** also holds that "violent" disorderly conduct can be committed without the defendant touching or even attempting to touch the victim, but under ***Castleman*** a conviction that has the use or attempted use of "physical force" as an element necessarily requires at least some "offensive touching" by the defendant. In short, ***Castleman*** holds that a

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[4] *If* one did look at the "brute facts," *see* ***Mathis v. United States***, 136 S. Ct. 2243, 2251 (2016), in the 1993 complaint, one would certainly see allegations that Doubek engaged in violent conduct, as that term is understood per ***Leonard***, as the complaint alleges that Doubek "broke through the screen and storm door [at the residence of his estranged wife] and then punched a hole through the glass of the inside door with his fist"; "entered the house" "holding a 2 x 4 piece of wood raised up above his head and told [his estranged wife] that she 'was dead'"; and stated that if she "did not get away from the door he would 'let her have it'" and "that he did not care what happened to him if he killed her." There are, however, no allegations that he touched his wife or even attempted to touch her (e.g., there is no allegation that he swung the 2 x 4 at her and missed) as required by ***Castleman*** in order to constitute the use or attempted use of "physical force." *See* ***Castleman***, 572 U.S. at 162-63.

According to the record in this case, the records related to Doubek's 1993 conviction were purged and copies of the plea agreement and colloquy are not available. As a result, there is no further indication as to what exactly Doubek pled to—other than the generic "Disorderly Conduct" conviction identified on the judgment of conviction—or what facts the court found as providing a factual basis for the conviction.

conviction is not a conviction for a misdemeanor crime of domestic violence under 18 U.S.C. § 922(g)(9), prohibiting the possession of a firearm, unless the conviction involves "offensive touching," but ***Leonard*** holds that a conviction can be a conviction for a misdemeanor crime of domestic violence under this federal statute without the involvement of such touching. We ask the supreme court to accept certification and address the conflict between our ***Evans*** and ***Leonard*** decisions and the Supreme Court's decision in ***Castleman***.