

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 27, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2013AP839

Cir. Ct. No. 2012JV43

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

IN THE INTEREST OF KALEB K., A PERSON UNDER THE AGE OF 17:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

KALEB K.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Portage County:
THOMAS T. FLUGAUR, Judge. *Affirmed in part and reversed in part.*

¶1 SHERMAN, J.¹ Kaleb K. appeals an order of the circuit court adjudicating him to be a delinquent based on a finding he was guilty of disorderly

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

conduct, in violation of WIS. STAT. § 947.01(1) and unlawfully using a computerized communication system, in violation of WIS. STAT. § 947.0125(2)(d). Kaleb K. argues that the order should be vacated because: (1) Kaleb's conduct was protected by First Amendment freedom of speech protections and thus could not constitute disorderly conduct; (2) he did not send a message to another person within the meaning of § 947.0125(2)(d); and (3) he was denied his due process right to a neutral and impartial magistrate. For the reasons discussed below, I affirm in part and reverse in part.

BACKGROUND

¶2 The State filed a delinquency petition alleging that Kaleb committed disorderly conduct, contrary to WIS. STAT. § 947.01(1), and unlawfully used a computerized communication system, contrary to WIS. STAT. § 947.0125(2)(d). The allegations revolved around a video Kaleb posted on the internet website YouTube depicting him rapping a song he wrote about his Spanish teacher. The song is comprised of crude and vulgar sexual language about the teacher.

¶3 At trial, Kaleb asserted that the content of his rap was protected by the First Amendment, which barred the State from prosecuting him for disorderly conduct. Without explaining why the speech was not afforded First Amendment protections, the court concluded that the speech was not and that Kaleb was guilty of disorderly conduct. The court stated:

[I]f this is going to be a test case, I think it's a pretty poor one to take up to the Supreme Court if high school students are going to be allowed to make videos that are this abhorrent.

Frankly, it's one of the worst things I have ever seen, and I've seen a lot of bad things in juvenile court.

And if this is going to be protected behavior and all the high school kids in Wisconsin and around the country are going to be able to do this, I really have a very difficult time believing that.

It's one of the most obscene and hate-filled videos that I've ever seen. It's shocking, hard to watch, really disgusting.

It's beyond obscene and directed specifically at an individual, and this individual isn't a public figure, either, where there are greater protections for the creators under the First Amendment.

¶4 The court also found that Kaleb was guilty of unlawful use of a computerized communication system. The court entered a judgment of delinquency against Kaleb finding him guilty of both offenses. Kaleb appeals.

DISCUSSION

¶5 Kaleb argues that he could not be prosecuted for disorderly conduct or unlawful use of a communication system because the rap song he posted on YouTube was protected speech under the First Amendment. Kaleb also argues that the video he posted online did not constitute unlawful use of a computerized communication system, and that he was denied a neutral and impartial judge at trial.

1. Disorderly Conduct

¶6 Freedom of speech is guaranteed by the First Amendment of the United States Constitution. The First Amendment, which is applicable to States under the Due Process Clause of the Fourteenth Amendment, provides that “Congress shall make no law ... abridging the freedom of speech.” **44 *Liquormart, Inc. v. Rhode Island***, 517 U.S. 484, 489 n.1 (1996) (quoted source omitted). The amendment generally prevents government from proscribing speech

because of disapproval of the ideas expressed. *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 382 (1992).

¶7 In *State v. Douglas D.*, 243 Wis. 2d 204, 213, 626 N.W.2d 725 (2001), the supreme court held that speech that falls within the protection of the First Amendment is barred from prosecution for disorderly conduct under WIS. STAT. § 947.01, but that which is not constitutionally protected may fall within the punitive reach of § 947.01. *Id.* at 213, 226. The court in *Douglas* explained that certain categories of speech “are ‘likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest,’” and are thus unprotected. *Id.* at 217-18 (quoting *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949)). These categories of speech include: “‘fighting words’”; speech that incites others into imminent lawless action; obscenity, libel and defamatory speech; and “‘true threats.’” *Id.* at 218. The *Douglas* court further stated that the State bears the burden of proving that a defendant’s speech is constitutionally unprotected speech. *Id.* at 226.² Whether an individual’s speech is protected is a question of law, which we review de novo. See *Lounge Mgmt., Ltd. v. Town of Trenton*, 219 Wis. 2d 13, 19-20, 580 N.W.2d 156 (1998).

¶8 In the present case, Kaleb asserted at trial that his rap song was constitutionally protected speech. The prosecutor informed the court that she was not prepared to respond to the issue and the court asked defense counsel to explain

² The supreme court in *State v. Douglas D.*, 243 Wis. 2d 204, 225, 626 N.W.2d 725 (2001), also recognized that protected speech may be the basis of a disorderly conduct charge if a “nonspeech element,” separate from the content of the speech, is the basis of that charge. The court stated as an example that such nonspeech elements could include the excessive volume or “abusive” nature of the speech. *Id.* The State has not argued that any nonspeech elements were the basis of Kaleb’s disorderly conduct charge; therefore, I do not address whether Kaleb’s speech was prosecutable on that basis.

to the prosecutor what categories of speech are not protected. [R.30:94] Defense counsel did so and the prosecutor then stated, without further elaboration: “I believe the video speaks for itself. And I would note [] obscenity, fighting words, and hate speech”

¶9 The State does not argue on appeal that Kaleb’s speech is not protected because it constitutes obscenity, “fighting words,” or “hate speech,” as it asserted in conclusory fashion before the trial court, and has thus forfeited that argument. The State does, however, claim Kaleb’s speech is not protected because it is defamatory. However, the State did not raise this argument before the circuit court and has therefore forfeited its right to raise that argument on appeal. *See State v. Van Camp*, 213 Wis. 2d 131, 144, 569 N.W.2d 577 (1997) (arguments raised for the first time on appeal are generally deemed forfeited). Because the State has not raised any other preserved arguments on appeal that Kaleb’s speech was not protected and because the State has not otherwise shown that it met its burden of proving that Kaleb’s speech was not protected, I reverse that portion of the delinquency order finding Kaleb guilty of disorderly conduct.

2. *Unauthorized Use of a Computerized Communication System*

¶10 Kaleb challenges the circuit court’s finding that he is guilty of unlawful use of a computerized communication system, claiming that the content of his rap was protected by the First Amendment and that posting a video on YouTube did not constitute “send[ing] a message” to “another person” within the meaning of WIS. STAT. § 947.0125(2)(d). These present questions of law, which we review independently of the decision by the circuit court. *See State v. Cole*, 2000 WI App 52, ¶3, 233 Wis. 2d 577, 608 N.W.2d 432 (statutory construction presents a question of law which is subject to our de novo review).

¶11 WISCONSIN STAT. § 947.0125(2)(d) provides:

Whoever does any of the following is guilty of a Class B misdemeanor:

....

(d) With intent to frighten, intimidate, threaten or abuse another person, sends a message on an electronic mail or other computerized communication system with the reasonable expectation that the person will receive the message and in that message uses any obscene, lewd or profane language or suggests any lewd or lascivious act.

“Message” is defined as “any transfer of signs, signals, writings, images, sounds, data or intelligence of any nature” Section 947.0125(1).

¶12 Kaleb argues that the content of his video is protected and therefore he could not be prosecuted for unauthorized use of a computerized communication system. Kaleb relies on *Douglas D.*, but does not explain how the supreme court’s holding in that case that the content of protected speech is not punishable under WIS. STAT. § 947.01, the disorderly conduct statute, applies to violations of WIS. STAT. § 947.0125. In *Douglas D.*, the supreme court addressed whether speech alone could form the basis of proscribed “conduct” under § 947.01 and be punished under that statute. Although § 947.0125(2)(d) contains an element that is broad enough to include speech alone,³ the statute also contains other nonspeech elements. The statute requires that the defendant send a message to another person with the “intent to frighten, intimidate, threaten or abuse another person,” which are separate and distinct elements from the content of the speech. *Douglas D.* suggests that “nonspeech elements” of otherwise protected speech may be subject

³ WISCONSIN STAT. § 947.0125(2)(d) requires that the message in question use “obscene, lewd or profane language or suggest[] any lewd or lascivious act.”

to prosecution. See *Douglas D.*, 243 Wis. 2d at 225. Because Kaleb is not being punished for his speech alone, but also for “nonspeech elements,” which *Douglas D.* states may be subject to prosecution, I conclude that Kaleb was subject to prosecution for the unauthorized use of a computerized communication system.

¶13 Kaleb argues that posting a video on YouTube does not constitute sending a message to another person (singular) because the video is posted for all people to see. However, nothing in the plain language of the statute limits who or how many people may view a message sent under that statute in order for the message to be prosecutable, and Kaleb does not cite this court to any legal authority indicating that such a limitation exists.

¶14 Kaleb argues that posting a video on YouTube is not “send[ing] a message” to another person because posting a video is not “actively ‘sending a message,’” but instead is making the content available for those who wish to actively seek it. Kaleb asks this court to read into WIS. STAT. § 947.0125(2)(d) a limitation on *how* a message must be conveyed to another person. However, the plain language of the statute does not indicate such a limitation and Kaleb has not cited this court to any legal authority supporting the imposition of such a limitation.

¶15 I also read Kaleb’s brief as arguing that posting his video on YouTube cannot be construed as sending a message to his teacher because the evidence indicates that he attempted to ensure that his teacher would not know about it. Kaleb testified at trial that he told his friends to keep his rap about his teacher “on the down low and stuff.” However, Kaleb also testified at trial that his intent in posting his videos on YouTube was “to get lucky and get a bunch of views on a video or something,” Kaleb used his YouTube screen name, Kissy

Kissy da 69, on a project for the teacher who was the subject of his rap, Kaleb told people about the video, and Kaleb admittedly posted the video on a public forum. In light of this evidence, I conclude that Kaleb's argument that he made attempts to ensure that his teacher did not see his rap to be without merit.

¶16 Because Kaleb has not presented this court with a persuasive argument that posting a video on YouTube did not constitute sending a message to his teacher under WIS. STAT. § 947.0125(2)(d), I affirm the circuit court's finding that Kaleb is guilty of violating that statute.

3. Neutral and Impartial Magistrate

¶17 Kaleb contends that he was denied his due process right to a neutral and impartial magistrate because during trial, the judge involved himself in the questioning of witnesses, asked "questions designed to bolster the prosecution's case," and failed to address Kaleb's First Amendment defense, which Kaleb claims indicates that the judge had already made up his mind regarding the outcome of the trial. To the extent that Kaleb's argument that he was denied a neutral and impartial magistrate relates to his charge for disorderly conduct, I have already concluded that the State has failed to establish that Kaleb's conduct was not protected, and thus not subject to prosecution for disorderly conduct and therefore I need not and do not address this argument. *See Sweet v. Berge*, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983) (if a decision on one point

disposes of the appeal, the court will not decide other issues raised).⁴ To the extent that Kaleb's argument relates to his conviction for unauthorized use of a computerized communication system, nothing in the record persuades me that the judge acted unfairly when it found Kaleb guilty of that offense.

By the Court.—Order affirmed in part and reversed in part.

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

⁴ As a final matter, I note that the State's brief was wrought with arguments and explanations that appear to have been copied and pasted into its brief without proper credit given to the original sources. I also note that the State's brief does not contain a table of contents nor a table of cases, as required by the rules of appellate procedure. See WIS. STAT. Rule 809.19(1)(a). I caution counsel to, in the future, give credit where credit is due and to adhere to the rules of appellate procedure when submitting a brief before this court.

