COURT OF APPEALS
DECISION
DATED AND FILED

November 8, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP2036-CR **Cir. Ct. No. 2014CF758**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KEITH J. EGGUM,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County: RALPH M. RAMIREZ, Judge. *Affirmed*.

¶1 HAGEDORN, J.[1] On a Saturday night in July 2014, patrons and pals were enjoying "The Rumble by the River" in Big Bend, a tractor and truck

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

pull regaled with songs and spirits. Rain and storms, however, led police and the event organizers to shut down the festival early. Keith Eggum, with unused (and potentially nonrefundable) beer tickets in hand, was none too pleased and refused to leave. After several minutes of increasingly heated conversation with multiple officers, Big Bend Police Chief Donald Gaglione ordered Eggum to leave the premises. Eggum did not comply and loudly punctuated his defiance with some colorful and crass words. Eggum's actions disrupted departing patrons and festival organizers, requiring additional officers to divert their attention from helping other guests evacuate safely. Based on these actions, Gaglione arrested Eggum for disorderly conduct.

¶2 On appeal, Eggum argues that his tasteless retorts—which he now characterizes as a sort of protest against government action—are the real reason he was charged with disorderly conduct. He argues this was protected speech under the First Amendment and that the jury was erroneously instructed. Eggum also asserts that he was deprived of a fair and impartial trial when he was denied a haircut prior to trial and by the presence of additional officers in the courtroom. We disagree and affirm.

BACKGROUND

¶3 Eggum was charged with disorderly conduct and resisting an officer, both as a repeater.[2] The case proceeded to a jury trial where Eggum represented himself; the jury found him guilty of all charges. At his postconviction hearing, Eggum moved for a new trial based on the circuit court's failure to conduct the

[2] The State originally charged Eggum with battery of a peace officer as well, but the charge was dismissed.

colloquy required by ***State v. Klessig***, 211 Wis. 2d 194, 564 N.W.2d 716 (1997), to ensure he knowingly, intelligently, and voluntarily waived his right to counsel. The State admitted it could not carry its burden to prove that Eggum's waiver of his right to counsel was knowing and intelligent. Thus, the circuit court granted Eggum's motion for a new trial.

¶4 Prior to the second jury trial, Eggum filed a motion to dismiss the charges, arguing they were based solely on his "statements of protest" which were protected speech.[3] The complaint alleged that Eggum caused a disturbance when police asked him to leave The Rumble by the River. According to the complaint, the event organizers decided to shut down the festival for public safety reasons due to inclement weather, but an intoxicated Eggum refused to exit the beer tent while shouting profanities. The complaint further alleged that multiple officers, including Gaglione, attempted to convince Eggum to leave. When Gaglione told Eggum that "it was time to go," Eggum responded by getting "within inches" of Gaglione's face and inviting the police chief to "suck his dick." Eggum also reiterated that he would not leave and would "sleep in the tent" despite being ordered to leave. Eggum eventually had to be forcibly removed from the tent.

¶5 At the motion hearing, the State opposed Eggum's motion to dismiss the complaint and explained that its theory of disorderly conduct was that Eggum's interference with the officer's duties "caused a disturbance," not that his words themselves were offensive. Because the State was not attempting to prosecute Eggum solely for his words, the court denied the motion to dismiss. The

[3] Eggum also argued that because the officers had no authority to arrest him for disorderly conduct, he could not be guilty of resisting that unlawful arrest.

court specifically noted that the complaint contained allegations of physical conduct, not merely statements of protest as Eggum insisted.

¶6 Immediately prior to trial, Eggum indicated that he would not participate in the trial unless he received a haircut. This protest regarding his appearance reached a crescendo when Eggum donned a makeshift clown nose he had hidden in his jail uniform.[4] He also refused to wear the civilian clothes his counsel had provided for him and expressed his desire to wear the prison garb and shackles his counsel referred to as a "clown uniform." After the circuit court explained the severe disadvantages of appearing in prison garb—and refused to allow Eggum to appear while wearing the clown nose—Eggum relented and put on civilian clothes for the trial. The court ensured that several photographs were taken of Eggum's hair and found that Eggum's hair "looks fine." The court explained to Eggum:

> [Your hair] may be longer than you're used to. It may be longer than I am used to, but there doesn't seem to be any problem or anything inappropriate about your hair at this time. Nothing that would in any way, in my estimation, affect the jurors.
>
> I've—as we've been sitting here, I've had you photographed so a record is made of what your hair looks like. It's not wild. It's not thrown about in disarray or anything like that. It's a decent head of hair.

The court also noted that "extra deputies" were present in response to "security issues" occasioned by Eggum's prior conduct in jail.

[4] A supplemental narrative from one of the deputies assigned for security at trial indicated that the clown nose was made of balled-up toilet paper and stuck to Eggum's nose with shaving cream. Upon affixing this "reddish" contrivance to his face, Eggum said, "If you're going to treat me like a clown, I might as well look like one."

¶7 At trial, Gaglione testified about Eggum's disturbance at The Rumble by the River. Gaglione explained that eight of the thirteen officers in his department were assigned to patrol the event, which took place in the village park. In addition to the truck and tractor pull, the event featured two tents—one with a band performing and another serving beer and other alcoholic beverages. The weather was overcast and raining. A thunderstorm then rolled in, which caused the truck and tractor pull to be cancelled early. However, the band and beer tents remained open for some time afterwards. Gaglione explained that the rain "got heavier," which created a dangerous situation in the tents due to the combination of electrical equipment and standing water. As a result of this "safety concern," the event organizers and the police came to a mutual decision to close down the beer and band tents at approximately 9:00 p.m.—two hours early.

¶8 This was not a popular decision. As Gaglione and his officers moved from group to group of festival-goers explaining the reasons for the shutdown, they received some pushback.

> There [were] several people that said, "Why are you doing this?" You know, we have—some people had a handful of beer tickets left. They said, "Well, what are we going to do with our tickets?" That's when we explained to them, took our time, "Call [the Celebrations Committee] on Monday. They'll work it out with you." That's between the event organizers and the people that were attending the festival.

¶9 Gaglione eventually reached Eggum, who was located in the beer tent with a number of unused beer tickets along with around fifty other people who had not yet left. Gaglione testified that Eggum appeared "somewhat intoxicated," and as "soon as I walked up to him … you could see he was upset." Upon being approached, Eggum "immediately said he wasn't going to leave." Gaglione explained the reasons for ending the event, and Eggum responded by telling

Galigone, "You can suck my dick." Eggum became "very loud" and "very profane" during the conversation. Gaglione testified that Eggum got "into my face" and "took his finger and stuck it into my chest—physically into my chest." Despite this physical confrontation, Gaglione explained that he still attempted to get Eggum to leave the tent voluntarily, but Eggum replied that "he was going to sleep" there.

¶10 Gaglione also averred that Eggum was "yelling profanities" so loudly that other festival goers turned to see the commotion, delaying their departure. At this point, Gaglione explained, two additional officers were diverted from their duties to deal with Eggum:

> Q: Chief, how many officers then became involved with Mr. Eggum?
>
> A: At that point there was myself, and Sergeant Dingman was standing next to me. Officer Wilson was right there—right behind Mr. Eggum, and there were several officers in the vicinity because all of us were in the tent.
>
> Q: And was Mr. Eggum's conduct preventing Sergeant Dingman and the other officers that you mentioned from asking other people to leave?
>
> A: Absolutely.

An event organizer also came over in a futile attempt to convince Eggum to leave.

¶11 After a total of five to six minutes of trying—and failing—to gain Eggum's peaceful compliance, Gaglione arrested Eggum for disorderly conduct. He testified that due to Eggum's loud and boisterous conduct and refusal to leave, "there was no other decision but to go hands-on and place [Eggum] under arrest." Gaglione also explained that Eggum was arrested for refusing to leave when requested, sticking his finger in Gaglione's chest, and causing a "disturbance of

citizens in the area." Gaglione testified Eggum's profanity toward him had no impact on his arrest.

¶12 After the close of testimony, Eggum's counsel requested that the disorderly conduct instruction, WIS JI—CRIMINAL 1900, be modified to inform the jury that whether language or conduct is disorderly depends on whether it is constitutionally protected speech. The proposed instruction went on to state that Eggum could only be found guilty of disorderly conduct if his words or "expressive conduct" constituted "true threats" or "fighting words." The court declined to give the proposed instruction. WISCONSIN JI—CRIMINAL 1900 "is a correct statement of the law," the court explained. In addition, Eggum was free to argue that he was merely exercising his right to free speech.

¶13 Eggum's counsel took advantage of the opportunity to address his free speech concerns with the jury during closing arguments. Counsel characterized Eggum's conduct as "naughty words" and argued that "[t]here is nothing wrong with a citizen of the United States opposing and challenging a police decision." Counsel further maintained that the ability to verbally oppose police decisions makes America a free nation. The jury found Eggum guilty of disorderly conduct but not guilty of resisting arrest.

¶14 Eggum filed a motion for postconviction relief, alleging that (1) his charges should have been dismissed because "Eggum was arrested purely for voicing his opposition to police," and that the court should have given his requested instruction; and (2) he was denied a fair trial due to his disheveled hair

and because of the presence of additional deputies in the courtroom prior to trial.[5] The circuit court denied the motion. The court found that the additional deputies were necessary for security purposes and "appropriate" under the circumstances. As to the free speech issue, the court rejected Eggum's arguments and concluded that Eggum's counsel "had ample opportunity and did very effectively argue on behalf of Mr. Eggum that this was free speech and the finder of fact didn't buy it." The court also reiterated its factual finding that Eggum's physical appearance was "appropriate" and his hair looked "marvelous." Eggum appeals.

DISCUSSION

¶15 On appeal, Eggum reiterates that his conviction was improper because his comments to the officers were protected speech and that his right to a fair trial was violated because he was denied a haircut prior to trial and due to the presence of enhanced security during the trial. We affirm on all grounds.

A. Disorderly Conduct and Free Speech

1. General Principles

¶16 Wisconsin's disorderly conduct proscription is contained in WIS. STAT. § 947.01(1). It provides that anyone who, "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." ***Id.*** The crime has two elements: (1) "the conduct must be of the type enumerated in the

[5] Eggum additionally took issue with the lack of a competency evaluation, but does not pursue this issue on appeal.

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). 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).

¶17 The First Amendment to the United States Constitution prohibits the government from making laws "abridging the freedom of speech." U.S. CONST. amend. I. It is true that WIS. STAT. § 947.01 "is not aimed at circumscribing the content of speech directly." ***State v. A.S.***, 2001 WI 48, ¶13, 243 Wis. 2d 173, 626 N.W.2d 712. However, our supreme court has recognized that a hearty exercise of the right to speak freely could very well have "a tendency to disrupt good order" or "cause or provoke a disturbance." *See* ***King***, 148 Wis. 2d at 540 (describing the "elements" of disorderly conduct).

¶18 Therefore, our cases have drawn some boundary lines. Pure speech is generally not susceptible to criminal prosecution; penalizing conduct, however, is another matter. *See* ***State v. Douglas D.***, 2001 WI 47, ¶16, 243 Wis. 2d 204, 626 N.W.2d 725. "It is not 'an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.'" ***State v. Robins***, 2002 WI 65, ¶42, 253 Wis. 2d 298, 646 N.W.2d 287. Conduct that tends to cause a disturbance, even if interwoven with protected

speech, is itself not subject to First Amendment protection. *See* ***State v. Zwicker***, 41 Wis. 2d 497, 509, 164 N.W.2d 512 (1969). As our supreme court explained in ***Zwicker***,

> The statute does not proscribe activities intertwined with protected freedoms unless carried out in a manner which is violent, abusive, indecent, profane, boisterous or unreasonably loud, or conduct similar thereto, *and* under circumstances in which such conduct tends to cause or provoke a disturbance. Prohibition of conduct which has this effect does not abridge constitutional liberty.

Id.

¶19 Thus, punishing disorderly "conduct" is constitutionally permissible even when speech is involved. For example, "'unreasonably loud' speech—even if the words themselves are protected by the First Amendment—carries with it the nonspeech element of excessive volume." *See* ***Douglas D.***, 243 Wis. 2d 204, ¶24. This means that whether conduct is disorderly is dependent on the surrounding circumstances, and "conduct that is protected by the First Amendment under one set of circumstances may be prosecutable under different circumstances." ***Id.***, ¶24 n.9. While political speech may be protected, "shouting a political speech over a megaphone in a residential area at 2:00 a.m. likely would be deemed prosecutable disorderly conduct." ***Id.*** Even though the State's application of WIS. STAT. § 947.01 "may result in the incidental limitation on the content of speech," this incidental limitation is constitutionally permissible. ***A.S.***, 243 Wis. 2d 173, ¶13.

¶20 This background helps separate the wheat from the chaff in Eggum's argument. Eggum argues that constitutionally protected speech is not a citable offense based on its effects on listeners, and that only true threats or fighting words are proscribable. But as we have seen, conduct associated with words—which might depend on the time, manner, and place where the words are spoken

(the surrounding circumstances)—can transform even otherwise protected speech into illegal disorderly conduct.

¶21 With this legal framework in mind, Eggum's objections to his conviction make no headway. He first argues the charges should have been dismissed prior to trial because he was arrested on the basis of his speech alone. Second and relatedly, he argues that the jury was erroneously instructed.

2. Motion to Dismiss/Sufficiency of Evidence

¶22 Eggum's first argument is difficult to track. On the one hand, he states multiple times that the charges "should have been dismissed prior to trial" because his statements were protected speech. On the other hand, however, Eggum repeatedly brings up the evidence presented at trial, insisting it shows that he "was convicted based purely upon his constitutionally protected words." Thus, we cannot tell whether Eggum desires to challenge the circuit court's denial of his pretrial motion to dismiss, whether the evidence supports his conviction, or both.[6] In the interest of completeness, we address and reject both.

¶23 We first conclude the circuit court properly denied Eggum's motion to dismiss. Eggum's motion to dismiss averred that the complaint must be dismissed because the charges were based entirely on Eggum's "statements of protest to the Police Chief and Officer Dingman." According to Eggum, WIS. STAT. § 947.01 "cannot be applied to speech" unless the content of the speech was

[6] Most of Eggum's briefing addressing this question constitutes a bald assertion that his conviction was for his speech, a pronouncement both the State and the circuit court said was not true. To the extent Eggum attempts to argue some other legal theory that this court is not sufficiently prescient to discern, we reject it as insufficiently developed.

unprotected. Eggum's argument requires us to determine "the nature and scope of the disorderly conduct statute" and apply constitutional principles to a set of facts, both questions of law. *See* ***A.S.***, 243 Wis. 2d 173, ¶¶11, 19.

¶24 Turning to the complaint, it alleged that Eggum cursed and shouted at the police, refused to leave the beer tent despite being ordered to do so, and had to be "forcibly removed from the tent." All of this boisterous conduct, according to the complaint, was in the midst of a weather situation thought to be dangerous enough to ask patrons to leave the premises. Considering the surrounding circumstances, the circuit court correctly denied the motion to dismiss. Refusing to leave in a potentially dangerous situation despite a lawful order to do so while screaming and cursing at the officers moves well beyond protected protest; it is conduct that tends to provoke a disturbance.

¶25 Throughout his brief, Eggum offers no defense to this conduct. He does not argue that he was entitled to stay in the beer tent after being asked to leave. Nor does he offer any explanation as to how refusing to leave when asked to the point he had to be forcibly removed, which had the effect of taking additional law enforcement resources away from other tasks and slowing the evacuation of the premises, is not "otherwise disorderly" under WIS. STAT. § 947.01. The complaint reflects an arrest and prosecution based upon unlawful conduct, not simply "statements of protest" as he suggests. The motion to dismiss was rightly rejected by the circuit court.

¶26 To the extent Eggum challenges the sufficiency of the evidence presented at trial, the State's case for disorderly conduct was substantial. Eggum advances a favorable interpretation of the evidence—the testimony reveals that he was convicted solely, he argues, for his constitutionally protected words. But

viewing the testimony at trial in the light most favorable to sustaining the jury's verdict, we must reject Eggum's preferred interpretation of the evidence. *See* ***State v. Alles***, 106 Wis. 2d 368, 376–77, 316 N.W.2d 378 (1982) (explaining that an appellate court may overturn a jury verdict "only if, viewing the evidence most favorably to the state and the conviction, it is inherently or patently incredible, or so lacking in probative value that no jury could have found guilt beyond a reasonable doubt") (citation omitted).

¶27 Consistent with the allegations in the complaint, the evidence at trial established the following facts. The police and the event organizers decided to end the Rumble by the River prematurely due to safety concerns—a decision they had every right to make. As there was no private security, the task of convincing the revelers to leave—and forcing them to do so if they refused—fell to the police. Although it was not a popular decision, most complied without incident. Eggum, however, did not. According to Gaglione, Eggum was ordered to leave and refused to do so in a loud, boisterous, and profanity-laden manner, testimony Eggum does not dispute in any meaningful way on appeal. Eggum escalated his already inappropriate conduct by poking Gaglione in the chest. Patrons the police were attempting to convince to leave stopped to watch instead of vacating the area. Eggum's conduct also drew two other officers away from their duties to assist Gaglione in his attempt to get Eggum to leave peaceably, actions which delayed getting other festival-goers to safety. His refusal to leave eventually required the officers to forcibly remove Eggum from the beer tent. Viewing the evidence in the light most favorable to sustaining the verdict, the evidence more than sufficiently supported Eggum's conviction for disorderly conduct.

3. Jury Instructions

¶28 Eggum's second free speech challenge to his conviction takes issue with the circuit court's decision to give the general disorderly conduct instruction (WIS JI—CRIMINAL 1900) rather than his lengthier proposed instructions purporting to "address the current state of the law when dealing with constitutional speech." Eggum's instructions would have informed the jury that whether conduct is disorderly "depends on whether the physical acts or language are or are not constitutionally protected speech or … expressive conduct." The instruction further explained that "[c]onstitutionally protected speech is never 'disorderly conduct.'" The instruction then explained two types of speech—true threats and fighting words—that are not protected under the First Amendment.[7]

¶29 Eggum insists that WIS. STAT. § 947.01 is "overbroad" and his instructions on applicable First Amendment jurisprudence were necessary to bring the statute within constitutional limits. He takes the position that the Wisconsin Supreme Court's decisions in ***A.S.*** and ***Douglas D.*** significantly narrowed the application of the statute such that "speech can only be prosecuted if it falls 'outside the protections of the first amendment.'" Eggum maintains that, without instructions incorporating these principles, "the jury could easily have mistaken offensive speech for offensive conduct."

¶30 We generally review the circuit court's decision on jury instructions for an erroneous exercise of discretion; the circuit court must exercise its

[7] The instruction would have additionally informed the jurors that "[c]onduct that is not within the narrowly limited category of 'true threats'" or "'fighting words' is not [d]isorderly [c]onduct."

discretion to fully and fairly inform the jury of the law. ***State v. Vick***, 104 Wis. 2d 678, 690, 312 N.W.2d 489 (1981). "This discretion extends to both choice of language and emphasis." ***Id.*** Additionally, "the appropriateness of giving particular instruction turns on a case-by-case review of the evidence, with each case necessarily standing on its own factual ground." ***Id.*** (citation omitted). We review de novo whether a given instruction is a correct statement of the law. ***State v. Wille***, 2007 WI App 27, ¶23, 299 Wis. 2d 531, 728 N.W.2d 343. "If the instructions given by the trial judge adequately cover the law, this court will not find error in his refusal to give a particular instruction, even though that instruction is not erroneous." ***State v. Kemp***, 106 Wis. 2d 697, 706, 318 N.W.2d 13 (1982). We conclude that the instructions here were an accurate and sufficient statement of the law based upon the facts of this case. Moreover, Eggum's proposed instructions were appropriately rejected because they were not an accurate statement of the law.

¶31 The instructions given to the jury here defined the two elements of disorderly conduct: (1) "[t]he defendant engaged in violent, abusive or otherwise disorderly conduct" and (2) "[t]he conduct of the defendant, under the circumstances as they then existed, tended to cause or provoke a disturbance." The instructions defined disorderly conduct as follows:

> "Disorderly conduct" may include physical acts or language or both.
>
> The general phrase "otherwise disorderly conduct" means conduct having a tendency to disrupt good order and provoke a disturbance. It includes all acts and conduct as are of a nature to corrupt the public morals or to outrage the sense of public decency, whether committed by words or acts. Conduct is disorderly although it may not be violent, or abusive if it is of a type which tends to disrupt good order and provoke a disturbance.

> The principle upon which this offense is based is that in an organized society a person should not unreasonably offend others in the community. This does not mean that all conduct that tends to disturb another is disorderly conduct. Only conduct that unreasonably offends the sense of decency or propriety of the community is included. It does not include conduct that is generally tolerated by the community at large but that might disturb an oversensitive person.

¶32 Our supreme court approved of a nearly identical instruction given under similar circumstances in ***Zwicker***, 41 Wis. 2d at 513-14. In ***Zwicker***, the defendants were convicted of disorderly conduct in connection with two campus protests held in a university building where a chemical manufacturer was holding interviews. ***Id.*** at 501-02.[8] The conduct of the defendants included refusing to comply with previously agreed-upon rules for the demonstration and refusing to leave when those rules were violated, refusing to move and allow passage through a hallway, and blocking a door to a business office. ***Id.*** at 502-05. As Eggum does here, the defendants maintained that their conduct was protected by the First Amendment and took issue with the given jury instruction defining disorderly conduct. ***Id.*** at 511, 513.

¶33 The jury instructions given in ***Zwicker*** were nearly identical to the one given here:

> As to the first element the court charged the jury that disorderly conduct included language and that "the general phrase 'disorderly conduct' means conduct having a tendency to disrupt good order and provoke a disturbance. It includes all such acts and conduct as are of a nature to corrupt the public morals or to outrage the sense of public decency, whether committed by words or acts. Conduct is disorderly, although it may not be boisterous or

[8] The protests concerned the Vietnam War, and the chemical manufacturer, among other things, produced napalm. ***State v. Zwicker***, 41 Wis. 2d 497, 501-02, 164 N.W.2d 512 (1969).

> unreasonably loud, if it is of a type which tends to disrupt good order and provoke a disturbance."

Id. at 514. The court concluded that "under the facts of this case the instructions sufficiently apprised the jury of the nature of the term 'disorderly conduct.'" ***Id.*** at 515. In addition, the second portion of the instructions in Eggum's case quoted above are taken nearly verbatim from ***Zwicker***'s additional exposition of when conduct crosses the criminal line and becomes prosecutable. *See* ***id.*** at 508.

¶34 In light of the testimony at trial and our supreme court's endorsement of a substantively identical instruction, we conclude that the given instruction was a correct statement of the applicable law. The mere fact that Eggum was speaking while he refused to leave and caused a disturbance does not alter our analysis because WIS. STAT. § 947.01 may limit speech when it is "carried out in a manner which is violent, abusive, indecent, profane, boisterous or unreasonably loud" and is of the type that has "a tendency to disrupt good order and provoke a disturbance." *See* ***Zwicker***, 41 Wis. 2d at 509, 514.

¶35 Contrary to Eggum's argument, ***Douglas D.*** and ***A.S.*** did not declare that WIS. STAT. § 947.01 was overbroad or in need of any corrective instruction. Nor did either decision cast doubt on the propriety of the pattern jury instruction given here. The decisions merely addressed under what circumstances a person may be prosecuted solely for the content of his or her speech. *See* ***A.S.***, 243 Wis. 2d 173, ¶11 (addressing "whether the disorderly conduct statute can be applied to regulate speech when that speech is unaccompanied by any physical conduct and is not unreasonably loud"); ***Douglas D.***, 243 Wis. 2d 204, ¶25 (addressing whether a student could be convicted of disorderly conduct for the content of a creative writing assignment). As discussed above, ***Douglas D.*** acknowledged that otherwise protected speech may contain proscribable

nonspeech elements—like excessive volume—and conduct that may be protected by the First Amendment under one set of circumstances might be prosecutable disorderly conduct under different circumstances. *See* ***Douglas D.***, 243 Wis. 2d 204, ¶24 & n.9. Neither decision overruled ***Zwicker*** or cast doubt on its clear language. In fact, both cases cited it with approval. *See* ***A.S.***, 243 Wis. 2d 173, ¶¶13, 15; ***Douglas D.***, 243 Wis. 2d 204, ¶21.

¶36 Given this backdrop, the circuit court reasonably and correctly concluded that the pattern instruction was sufficient and further instruction was unnecessary because the "factual situation" did not warrant it. As the given instructions properly stated the law, the decision whether to give Eggum's requested instruction was within the court's discretion, and Eggum has not shown that the court's exercise of discretion was erroneous. While courts should be sensitive to any impingement of First Amendment rights, the factual situation here looks like a textbook example of disorderly conduct where the risk of incidental impingement on the speaker's First Amendment rights was slight at best. The circuit court appropriately analyzed the circumstances and charges and concluded that Eggum was being prosecuted for his unlawful conduct, not unwelcome words.[9]

[9] Where jury instructions may have misled the jury into convicting a defendant on constitutionally impermissible grounds, "Wisconsin courts should not reverse a conviction simply because the jury possibly could have been misled; rather, a new trial should be ordered only if there is a reasonable likelihood that the jury was misled and therefore applied potentially confusing instructions in an unconstitutional manner." ***State v. Lohmeier***, 205 Wis. 2d 183, 193-94, 556 N.W.2d 90 (1996). This inquiry is done by viewing "the jury instructions in light of the proceedings as a whole." ***Id.*** at 194. Eggum does not appear to argue that the jury instructions were misleading even if technically correct. To the extent Eggum makes this argument, we see little to no likelihood that the jury applied these legally correct instructions and convicted him in violation of his First Amendment rights.

¶37 Furthermore, even if the circuit court had been inclined to give Eggum's proposed instructions, to do so may have been error. Eggum's proposed instructions were an incorrect statement of the law. They would have erroneously informed the jury that "[c]onstitutionally protected speech and expressive conduct is never 'disorderly conduct.'" ***Douglas D.***—one of the very cases Eggum cites—contradicts this proposition.

¶38 In short, Eggum tries to recharacterize his arrest, the complaint, and the testimony at trial, arguing that the content of his words impermissibly constituted the offense. But this portrayal is simply not accurate. It was the way he used his words, along with associated disorderly actions, that constituted the conduct for which he was arrested, charged, and convicted. We see no error.

B. Fair Trial

¶39 Eggum finally insists that he was denied the right of a fair and impartial trial for two reasons. First, he claims that he was denied a haircut prior to trial and appeared "noticeably disheveled" as a result. Second, he maintains that he was prejudiced by the presence of additional officers during his trial. Neither argument makes any headway.

¶40 His request that we reverse his conviction based on his allegedly disheveled hair is a veiled invitation to overturn the court's factual finding that his haircut and appearance was presentable, even "marvelous." After viewing the photographs of Eggum's hair and appearance in the record, this finding was not clearly erroneous, as Eggum must demonstrate. *See* ***State v. Leighton***, 2000 WI App 156, ¶5, 237 Wis. 2d 709, 616 N.W.2d 126. Additionally, Eggum does not support his argument with any applicable case law; he merely attempts to analogize the denial of his haircut request to being forced to wear shackles. This

analogy, a strained one at best, is not sufficient legal support to reverse his conviction.

¶41 As to his argument that he was prejudiced by the presence of additional officers, he concedes that our precedents "allow[] for this greater show of force." Even so, he relies on "recent studies"—which he does not specifically identify—that supposedly support his assertion that increased police presence might improperly influence the jury. Accordingly, he maintains that our case law "should be reevaluated and overturned." We, of course, cannot do so. *See* ***Marks v. Houston Cas. Co.***, 2016 WI 53, ¶78, 369 Wis. 2d 547, 881 N.W.2d 309. His arguments are properly addressed to the Wisconsin Supreme Court.

¶42 Because Eggum has not demonstrated any error in his conviction for disorderly conduct, the judgment of conviction is affirmed.

By the Court.—Judgment affirmed.

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