

IN THE
MISSOURI COURT OF APPEALS
EASTERN DISTRICT

STATE OF MISSOURI,)	
)	
Respondent,)	
)	
vs.)	APPEAL NO. ED97955
)	
MARK ANTHONY WOODEN, SR.,)	
)	
Appellant.)	
)	

APPEAL TO THE MISSOURI COURT OF APPEALS, EASTERN DISTRICT
FROM THE CIRCUIT COURT OF THE CITY OF ST. LOUIS,
DIVISION TWENTY-FOUR,
THE HONORABLE PAULA K. BRYANT

APPELLANT'S STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

Mark Anthony Wooden, Sr. appeals the judgment and sentence imposed against him by the Honorable Paula K. Bryant for two misdemeanor counts of Harassment pursuant to RSMo §565.090.1 (2) and (5) and one misdemeanor count of Possession of Less than thirty five grams of Marijuana pursuant to RSMo §195.202 after a jury trial in the Twenty-Second Judicial Circuit Court for the City of St. Louis, State of Missouri.¹ On January 10, 2012 Mr. Wooden was sentenced to one day on each count with all sentences to run concurrently and the court granted credit for time served. Mr. Wooden filed his notice of appeal on January 18, 2012.

The Missouri Supreme Court has jurisdiction to hear this appeal as to Point I. Article V, §3 of the Missouri Constitution reserves to the Supreme Court all questions regarding the constitutionality of a state statute. Mr. Wooden challenges Mo. Rev. Stat §565.090.1 because it violates Article I, §8 of the Missouri Constitution.

Article V, § 11 of the Missouri Constitution states, "In all proceedings reviewable on appeal by the supreme court or the court of appeals, appeals

¹ All statutory references are to Mo. Rev. Stat. 2010, unless otherwise indicated.

shall go directly to the court or district having jurisdiction, but want of jurisdiction shall not be ground for dismissal, and the proceeding shall be transferred to the appellate court having jurisdiction. An original action filed in a court lacking jurisdiction or venue shall be transferred to the appropriate court.”

Therefore, Mr. Wooden respectfully requests this case be transferred to the Supreme Court, which has jurisdiction as to Points I and II. Point III is not a matter reserved for the Supreme Court, so this Court has jurisdiction over it pursuant to RSMo §477.050.

STATEMENT OF FACTS

Mark Anthony Wooden, Sr. moved into the Sixth Ward of the City of Saint Louis, Missouri in 2004 (Mot Tr. 3; Tr. 412) ². An active member of his community, Mr. Wooden advocated for poor residents by reaching out to political officials to address housing conditions, among other concerns (Id). Kacie Starr-Triplett was elected to be the alderwoman for the Sixth Ward in 2007 and continued to hold that position through February 2011 (Mot Tr. 3; Tr. 222). As a resident of the Sixth Ward, Mr. Wooden sent emails to Alderwoman Starr-Triplett, between February 19, 2011 and February 24, 2011, expressing his dissatisfaction with her treatment of the poor residents of the Sixth Ward (Tr. 263; 415). Some of these emails contained text, some had links to audio MP3 files, some contained both (Tr. 225). The emails were all sent to an address alderwoman displayed on her public web page (Tr. 254). The purpose of this email address was to allow constituents like Mr. Wooden to contact her with their concerns (Tr. 258). The emails were not sent exclusively to Alderwoman Starr-Triplett and included as many as forty other recipients (Tr. 278-79; 429).

² The record on appeal will be cited to as follows: Transcript (Tr), Legal File (LF) and Motion to Suppress hearing transcript (Mot Tr).

At some point, the alderwoman contacted the police about the emails (Tr. 225). At the suggestion of officers, she emailed Mr. Wooden and asked him to stop emailing her (Tr. 245). Mr. Wooden agreed to remove her email address from further communications (Tr. 247). When asked, the alderwoman could not recall how many emails she received from Mr. Wooden after she asked him to stop emailing her, but she did receive some (Tr. 248). Mr. Wooden was arrested on February 24, 2011 (Tr. 331).

Based upon Alderwoman Starr-Triplett's claim the emails and attached audio files made her feel threatened, Mr. Wooden was charged with two counts of harassment pursuant to RSMo §565.090 (2) and (5) (LF 1; 7-8). He was also charged with one count of possession of marijuana pursuant to RSMo §195.202 (Id). Mr. Wooden moved for dismissal of the harassment charges because they violate his constitutional rights to freedom of speech and to petition the government for redress of grievances (LF 10-11; 12-19). In addition, he filed a motion to suppress statements relevant to the possession charge (LF 24-25). A hearing was held on October 6, 2011(LF 29). The Court denied Mr. Wooden's motions after the hearing (Id).

The government's case

The state offered the testimony of Alderwoman Starr-Triplett, a court reporter, a lab technician and several police officers (Tr. 211-404). The State

introduced various emails into evidence, dated February 19, 21, 23, and 24, 2011 (Tr. 229; 241; 250; 251). The emails were admitted over defense objection that the photocopies presented at trial did not comply with the best evidence rule (Id). A CD compilation of the audio files attached to the emails was also admitted over defense objection (Tr. 231).

Alderwoman Starr-Triplett was unable to identify any threats directed specifically towards her in any emails or audio files (Tr. 268-285). With regard to the audio files attached to State's Exhibit 1, an email from February 19, 2011, Alderwoman Starr-Triplett admitted "it did not specifically reference [her]." (Tr. 269). When asked, the alderwoman could not identify any threatening language in State's Exhibit 1 (Tr. 270). Instead, she cited "the tone" of the email and repeated, "[h]e does not specifically mention me" (Id).

State's Exhibit 2, an email with an attached audio file, similarly did not contain any threatening text (Tr. 273). Alderwoman Starr-Triplett asserted that the threats were contained in the audio attachment, though she was unable to point to any part of the eighteen minute long recording where she was specifically threatened (Tr. 274-275). The alderwoman testified that she felt "threatened and uncomfortable" because this audio recording mentioned something about a sawed off shotgun being dusted off and referenced the biblical figure Jezebel (Id; State's Ex. 10, mins. 8:00-12:00). She opined

"Jezebel" was a reference to her, though she admitted that this reference could have other meanings (Tr. 274).

State's Exhibit no. 3 was an email with text and an audio attachment (Tr. 240-241). The alderwoman forwarded this email to Officer Bret Cassity (Tr. 284). She added the following message to the officer: "Here is another message I recv'd early this morning. It's about a five minute recording. (sic) There are no threats in the message ... " (Tr. 284). When asked to identify the portion of State's Exhibit no. 4 which caused her to feel threatened, Alderwoman Starr-Triplett responded, "where it talks about The Lord Knoweth your Day is Cometh. (sic)" which was the subject of the email (Tr. 277). Again, she could not identify any reference made specifically to her (Tr. 278).

The remaining witnesses for the state were three police officers, a lab technician, and a court reporter (Tr. 327-404). With regard to the emails, Detective Cassity stated, "I don't recall anything stating that [Mr. Wooden] was going to directly assault her, no." (Tr. 368). He also testified that he didn't recall anything in the audio files "being a direct threat to [Alderwoman Starr-Triplett]." (Id). Det. Cassity testified that he observed a baggie of marijuana on the floor of the car Mr. Wooden rode in after his arrest (Tr. 350). The officer also testified Mr. Wooden was holding a small amount of what

appeared to be marijuana in his hand (Tr. 351). Det. Cassity testified that Mr. Wooden said "That's mine" in reference to the suspected marijuana (Tr. 350).

The Citizen's Case

Mr. Wooden testified in his own defense (Tr. 411-85). He explained he has "dealt with housing for over twenty years, and fairness for poor people." (Tr. 457). His efforts were recognized by the City of St. Louis with a St. Louisan Award for his "exceptional work" in the community (LF 69). After he moved to the Sixth Ward in 2004, he became frustrated with the lack of concern for poor residents in the neighborhood (Tr. 415-16). Of particular concern was Alderwoman Starr-Triplett's lack of response to housing issues for those residents (Id). In an attempt to have his voice heard Mr. Wooden sent emails to local government officials through the Citizen's Service Bureau (Tr. 426)³. Mr. Wooden admitted his emails contained strong language meant

³ The Citizen's Service Bureau ("CSB") is the customer service department for the City of Saint Louis. Residents may contact CSB to request a city service, report a complaint or get information about city hall. Residents may contact CSB through email, twitter, or by phone. See <http://stlouis-mo.gov/government/departments/public-safety/neighborhood-stabilization-office/citizens-service-bureau/How-to-file-a-service-request.cfm>.

to convey his message (Tr. 433). Mr. Wooden contacted the alderwoman because she was a “part of [the City of St. Louis] government” with the responsibility of representing Sixth Ward residents (Tr. 429). He “never ever, ever intended or even had any idea to hurt Miss Triplett” but rather was “trying to express to all of the people in housing, not just Kacie [Starr-Triplett]... how poor people are getting the bad end of the stick” (Tr. 434).

Trial counsel asked Mr. Wooden to clarify the reference to the sawed off shotgun (Tr. 438). Mr. Wooden said he was using it as a “metaphor of the truth” because neither the blast of a shotgun nor the truth “discriminate” (Tr. 440; State’s Ex. 10 mins. 3:00-4:00; 13:00-15:00). He told the jury he doesn’t even have a gun and never intended to use one (Id). Mr. Wooden’s use of Jezebel was also metaphoric and meant as a reference to “the subject matter of treating poor people fairly” (Tr. 445; State’s Ex. 10 mins. 9:00-11:00; 18:00).

Mr. Wooden also told the jury about his treatment by police when they arrested him (Tr. 448-55). On that day, he was carrying “a sign saying [d]on’t vote for Kacie.” (Tr. 448) Mr. Wooden was thrown in the back of the paddy wagon “like a piece of meat” and taken to the St. Louis City Justice Center (Tr. 454). Det. Cassity told him he “need[ed] to answer questions” (Tr. 452).

Mr. Wooden moved for judgment of acquittal at the close of the state’s case and at the close of all evidence because the state failed to provide

sufficient evidence of the charges (LF 104-07). Both motions were denied (Id). The jury found Mr. Wooden guilty and sentenced him to one day in jail on each count (Tr. 545; LF 143).

POINTS RELIED ON

I

The trial court plainly erred by denying Mr. Wooden's motion to dismiss Count II because RSMo §565.090.1 (5) is unconstitutionally overbroad and therefore violates Mr. Wooden's right to due process of law and freedom of speech as guaranteed to him by the First and Fourteenth Amendment to the United States Constitution and Article I, §§ 8 and 10 of the Missouri Constitution in that RSMo §565.090.1 (5) criminalizes conduct which is protected speech. Mr. Wooden was entitled to a dismissal of count II because his communications with Alderwoman Kacie Starr-Triplett are constitutionally protected and therefore cannot be criminalized by RSMo §565.090.1 (5).

State v. Vaughn, 366 S.W. 3d 513 (Mo. 2012)

Mo. Const. Article I, § 8

U. S. Const. Amend., I

II

The trial court erred in denying Mr. Wooden's motion to dismiss Count I because RSMo §565.090.1 (2) is unconstitutional because it violates Mr. Wooden's rights to freedom of speech and due process of law as guaranteed to him by the First and Fourteenth Amendments to the United States Constitution and Article I, §§ 8 and 10 of the Missouri Constitution in that it criminalizes constitutionally protected speech. Mr. Wooden was entitled to a dismissal of count I because his communications with Alderwoman Kacie Starr-Triplett do not constitute prohibited speech and therefore cannot be criminalized by RSMo §565.090.1 (2).

Chaplinsky v. New Hampshire, 315 U.S. 568 (1942)

Cohen v. California, 413 U.S. 15 (1971)

State v. Vaughn, 366 S.W. 3d 513 (Mo. 2012)

Mo. Const. Art. I, §8

U.S. Const. Amend., I

III

The trial court erred in denying Mr. Wooden's motion for judgment of acquittal on Count I at the close of all evidence because, viewed in the light most favorable to the verdict, the state failed to prove beyond a reasonable doubt Mr. Wooden harassed Alderwoman Starr-Triplett in that the evidence did not prove the communications contained offensive language which caused Ms. Starr-Triplett to have a reasonable fear of offensive physical contact or harm. The trial court's ruling violated Mr. Wooden's rights to due process of law and a fair and impartial trial as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§10 and 18(a) of the Missouri Constitution in that there was insufficient evidence presented at trial from which a reasonable jury could find Mr. Wooden guilty of harassment pursuant to RSMo §565.090.1 (2).

State v. Greenlee, 327 S.W.3d 602 (Mo. App. E.D. 2001)

State v. Koetting, 691 S.W.2d 328 (Mo. App. E.D. 1985)

Mo. Const. Art. I, §10

U.S. Const. Amend., XIV

Argument

I. The trial court plainly erred by denying Mr. Wooden's motion to dismiss Count II because RSMo §565.090.1 (5) is unconstitutionally overbroad and therefore violates Mr. Wooden's right to due process of law and freedom of speech as guaranteed to him by the First and Fourteenth Amendment to the United States Constitution and Article I, §§ 8 and 10 of the Missouri Constitution in that RSMo §565.090.1 (5) criminalizes conduct which is protected speech. Mr. Wooden was entitled to a dismissal of count II because his communications with Alderwoman Kacie Starr-Triplett are constitutionally protected and therefore cannot be criminalized by RSMo §565.090.1 (5).

Preservation of error

Appellant respectfully requests this Court review for plain error. Rule 30.20.⁴ Plain error relief is appropriate if this Court determines that Mr. Wooden has suffered a "manifest injustice or a miscarriage of justice." Rule 30.20; *State v. Gilmore*, 22 S.W.3d 712 (Mo. App. W.D. 1999).

⁴ Defense counsel challenged the constitutionality of count II on different grounds and therefore review of this point is not preserved (LF 10-11; 22-23).

Standard of Review

The Court has the discretion to review plain errors which effect substantial rights. *State v. White*, 247 S.W.3d 557, 560 (Mo. App. E.D. 2007). “In determining whether to exercise its discretion to provide plain error review, the appellate court looks to determine whether on the face of the appellant’s claim substantial grounds exist for believing that the trial court committed a “plain” error, which resulted in manifest injustice or a miscarriage of justice.” *Id*; quoting *State v. Barnaby*, 91 S.W.3d 221, 224–25 (Mo. App. W.D.2002). “Plain” error for purposes of Rule 30.20 is error that is evident, obvious and clear. *Barnaby*, 91 S.W.3d at 225.

Analysis

In light of the Missouri Supreme Court’s recent decision in *State v. Vaughn* which held RSMo §565.090.1 (5) unconstitutionally overbroad, this Court should find error and reverse the ruling of the trial court denying Mr. Wooden’s motion to dismiss count II. 366 S.W. 3d 513 (Mo.2012). Mr. Wooden was charged with harassment in Count II for making repeated, unwanted communication to Alderwoman Starr-Triplett (LF 7-8). The state presented evidence that he sent emails, some with attached audio files, to the alderwoman (Tr. 228; 237; 241; 243). She testified that she asked him to stop sending her emails (Tr. 245).

In *Vaughn*, the appellant was charged under the same subsection of RSMo §565.090.1 for making repeated, unwanted telephone calls to his former wife after she asked him not to call her again. *Id.* at 1. The Supreme Court held that the statute was overbroad because it criminalized constitutionally protected speech. *Id.* Specifically, it noted “the statute’s chilling effect upon political speech as well as everyday communications. For instance, individuals picketing a private or public entity would have to cease once they were informed their protestations were unwanted.” *Id.* at 3.

Mr. Wooden’s communications to the alderwoman were just that type of political protestation. Mr. Wooden was communicating with his government representative, via an email advertised on her public web page, regarding housing for the poor residents of his community (Tr. 429). When he was arrested on these harassment charges, Mr. Wooden was carrying what could be characterized as a picket sign, urging voters not to support the alderwoman in an upcoming primary election (Tr. 448).

The trial court committed plain error in denying Mr. Wooden’s motion to dismiss Count I. This ruling resulted in a manifest injustice because Mr. Wooden’s constitutional right to freedom of speech was violated.

Argument

II. The trial court erred in denying Mr. Wooden's motion to dismiss Count I because RSMo §565.090.1 (2) is unconstitutional because it violates Mr. Wooden's rights to freedom of speech and due process of law as guaranteed to him by the First and Fourteenth Amendments to the United States Constitution and Article I, §§ 8 and 10 of the Missouri Constitution in that it criminalizes constitutionally protected speech. Mr. Wooden was entitled to a dismissal of count I because his communications with Alderwoman Kacie Starr-Triplett do not constitute prohibited speech and therefore cannot be criminalized by RSMo §565.090.1 (2).

Preservation of Error and Standard of Review

Defense counsel filed written motions to dismiss Counts I and II (LF 10-11; 22-23). Defense counsel also made an oral motion to dismiss at a hearing held on October 6, 2011 (Mot Tr. 3).

The Court will review a ruling on a motion to dismiss for an abuse of discretion. *State v. Kleine*, 330 S.W. 3d 805, 808 (Mo. App. S.D. 2011); citing *State v. Keightley*, 147 S.W. 3d 179, 184 (Mo. App. S.D. 2004). "A trial court abuses its discretion when its ruling is clearly against the logic of the circumstances before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration." *Id.*

Analysis

Mr. Wooden is guaranteed the right to freedom of speech under the First Amendment to the United States Constitution as well as Article I, § 8 of the Missouri Constitution. Implicit within that right is the ability of any citizen to voice his dissatisfaction with government. Mr. Wooden's communications were meant as a commentary on the performance of his elected governmental representative. As applied to Mr. Wooden's email and audio communications, RSMo §565.090.1(2) is unconstitutional.

The state presented emails Mr. Wooden sent to his elected representative, Alderwoman Kacie Starr-Triplett, to an address she advertised on her public web page (Tr. 254). He sent her these emails to voice his opinion of her representation of poor residents within the Sixth Ward (Tr. 434). In doing so, Mr. Wooden was exercising his constitutionally protected right to freedom of speech and to petition the government, of which Alderman Starr-Triplett was a representative. His conviction under RSMo §565.090.1(2) cannot stand.

Not all speech is protected

While a citizen's right to speak freely is broad, it is not unlimited. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942); *State v. Smith*, 422 S.W.2d 50, 55 (Mo. banc 1967). There are certain categories of speech that do

not command First Amendment protection. Fighting words and obscenity are two notable examples. In *Chaplinsky*, the U.S. Supreme Court defined fighting words as “those by which their very utterance inflict injury or incite an immediate breach of the peace.” *Id* at 572. Therefore, Mr. Wooden’s email and audio communications to Alderwoman Starr-Triplett were not fighting words. There was no testimony that his words called for, nor could reasonably have caused, an immediate breach of the peace. Similarly, Mr. Wooden’s communications cannot be labeled as obscenity as they included no appeal whatsoever to any “prurient interest.” *Miller v. California*, 413 U.S. 15, 24 (1973).

Political speech is protected

In *New York Times v. Sullivan*, the U.S. Supreme Court held that criticism of public officials is a privilege afforded to citizens under the First Amendment. 376 U.S. 254 (1964). Similarly, *Cohen v. California* protected a person’s ability to speak out against the government, in this case the draft, against prosecution by the state. 413 U.S. 15 (1971). Mr. Cohen famously walked through a California courthouse wearing a jacket with the words ‘Fuck the Draft’ written on it. *Id* at 16. He was convicted of disturbing the peace through “offensive conduct” and given 30 days in jail. *Id*. The Supreme Court overturned his conviction because it found “[t]he conviction quite

clearly rest[ed] upon the asserted offensiveness of the words ... used to convey his message." *Id* at 18. The Supreme Court further stated that there was no conduct other than Mr. Cohen's message which was punished by the statute, therefore the conviction rested solely upon speech. *Id*.

Mr. Wooden's case is similar to *Cohen* in significant ways. First, his conviction rests solely upon the allegedly "coarse language" his emails and audio communications contained (LF 22-23). There was never any allegation made or proven that Mr. Wooden ever made any specific threats of harm towards the alderwoman. The sole basis for the charges against Mr. Wooden was the fact that he sent emails and audio communications to Alderwoman Starr-Triplett. Second, Mr. Cohen was convicted under a statute which criminalized "offensive conduct". 413 U.S. 15, at 16, n. 1. Mr. Wooden's conviction for harassment similarly rested on a finding that the language he used in his communications was "offensive to one of average sensibility." RSMo §565.090.1. Through State's Exhibit 10, a CD of the MP3 files attached to the emails, the State presented evidence that Mr. Wooden referred to the alderwoman as "Jezebel" and "a bitch in the Sixth Ward" (State's Ex. 10, mins. 9:00; 11:00-12:00). However, the audio files complain about the alderwoman catering to the richer residents of her ward and "abus[ing] the weak people in her care" (State's Ex. 10, mins. 8:00-9:00; 11:00). Both Mr. Cohen and Mr.

Wooden suffered convictions based solely upon their utterance of political opinions.

In *Cohen*, the Supreme Court asserted that the state could permissibly regulate the manner in which a citizen exercises his freedom of speech. 413 U.S. 15, at 19. The Court acknowledged fighting words and obscenity, among other types of speech, can be criminalized by the state. *Id* at 20. However, it held that Mr. Cohen's message, though "vulgar", did not fit into any of these categories. *Id*. In closing, the Court noted "one of the prerogatives of American citizenship is the right to criticize public men and measures." *Id* at 26. (quoting *Baumgartner v. United States*, 322 U.S. 665, 673-74 (1944)).

Missouri courts have also held that political speech is protected speech. "[T]he Court has frequently reaffirmed that speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Henry v. Halliburton*, 690 S.W.2d 775, 785 (Mo. 1985); quoting *Connick v. Meyers*, 461 U.S. 138, 145 (1983)(internal quotation marks omitted). Most recently, in *State v. Vaughn*, the Missouri Supreme Court echoed this sentiment. 366 S.W. 3d 513 (Mo.2012). The Court cited a "potential chilling effect upon political speech" as a primary basis for its conclusion that RSMo §565.090.1(5) is unconstitutionally overbroad. Mr. Wooden's

communications to Alderwoman Starr-Triplett are protected political speech and therefore cannot be criminalized by RSMo §565.090.1(2).

Mr. Wooden's communications were political speech

The emails sent by Mr. Wooden are not fighting words nor are they obscene. Mr. Wooden was exercising his right as a citizen to criticize a public official. The alderwoman admitted that the communications she received had a political message, "an opinion that, you know, Alderman Triplett doesn't care about poor people" (Tr. 266). She acknowledged that Mr. Wooden was criticizing her and calling her a "phony politician" (Tr. 263). She further admitted that the communications made reference to her service as an alderwoman (Tr. 266; State's Ex. 10, min. 9:00). State's Exhibit 1, an email with two audio attachments, "talks about a management company" Alderman Starr-Triplett's office helped fund (Tr. 269). According to the alderwoman's testimony, the email and audio attachments tie her "loosely to the reason why [Mr. Wooden] got evicted" (Tr. 271).

State's Exhibit 2 was also an email with attached audio files (Tr. 273). It is this audio attachment that includes references to assaults on politicians, "dusting off a sawed-off shotgun" and "Jezebel" (Tr. 238; 274; State's Ex. 10, mins. 3:00-4:00; 13:00-15:00). The audio also calls the alderwoman the "B word" (Tr. 274; State's Ex. 10, mins. 9:00; 11:00-12:00). However, throughout

the audio there are numerous references to biblical scripture and Mr. Wooden's opinion that the alderwoman, like the biblical figure Jezebel, does not care for her people (State's Ex. 10, mins. 9:00-11:00). Finally, the audio accuses Alderwoman Starr-Triplett of "killing her own for power" (State's Ex. 10, min. 18:00).

The alderwoman testified that she felt threatened by these references but admitted that they could be "metaphor[ic]" and Jezebel is a biblical character who was "notorious for not meeting the needs of her people" (Tr. 275-76). She testified she was particularly concerned about the references to the shotgun (Tr. 238). In the audio, Mr. Wooden mentions "dusting off a sawed-off shotgun" but he immediately provides context this stating he's "talking about the days before being saved" (Tr. 275; State's Ex. 10 mins. 3:00-4:00). This same imagery is used again several times in the remainder of the audio where Mr. Wooden explains he is referring to a "shotgun blast of truth" (State's Ex. 10, mins. 10:00-11:00). Alderwoman Starr-Triplett admitted that the references to Jezebel and the sawed-off shotgun could be metaphoric (Tr. 277-78).

The audio files presented to the jury as State's Exhibit 10 are political speech directed towards an elected government official and are therefore protected by the United States Constitution and the Missouri Constitution.

Therefore, Mr. Wooden's protestations cannot be criminalized by RSMo §565.090.1 and his conviction for harassment under this statute should be reversed.

Argument

III. The trial court erred in denying Mr. Wooden's motion for judgment of acquittal on Count I at the close of all evidence because, viewed in the light most favorable to the verdict, the state failed to prove beyond a reasonable doubt Mr. Wooden harassed Alderwoman Starr-Triplett in that the evidence did not prove the communications contained offensive language which caused Ms. Starr-Triplett to have a reasonable fear of offensive physical contact or harm. The trial court's ruling violated Mr. Wooden's rights to due process of law and a fair and impartial trial as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§10 and 18(a) of the Missouri Constitution in that there was insufficient evidence presented at trial from which a reasonable jury could find Mr. Wooden guilty of harassment pursuant to RSMo §565.090.1 (2).

Standard of Review

The Court reviews the denial of a motion for judgment of acquittal to determine if the State presented sufficient evidence to make a submissible case. *State v. Greenlee*, 327 S.W.3d 602, 617 (Mo. App. E.D. 2010) (citing *State v. Willis*, 239 S.W.3d 198, 199 (Mo. App. S.D. 2007)). "Appellate review of a challenge to the sufficiency of evidence supporting a criminal conviction is limited to a determination of whether sufficient evidence was presented at

trial from which a reasonable juror might have found the defendant guilty of the essential elements of the crime beyond a reasonable doubt.” *State v. Page*, 309 S.W.3d 368, 374–75 (Mo. App. E.D. 2010).

“When considering the sufficiency of the evidence to support a conviction, there must be sufficient evidence of each element of the offense.” *Greenlee*, 327 S.W.3d at 617, (citing *State v. Messer*, 207 S.W.3d 671, 674 (Mo. App. S.D. 2006)). “If the evidence is insufficient to sustain a conviction, plain error affecting substantial rights is involved from which manifest injustice must have resulted.” *State v. Withrow*, 8 S.W.3d 75, 77 (Mo. banc 1999).

Analysis

The state introduced emails and an audio CD into evidence (Tr. 228; 237; 241; 243). The emails were sent to a long list of people, not just the alderwoman and none of them were sent only to her (Tr. 369). During her testimony, Alderwoman Starr-Triplett could not identify any threats of physical harm made directly to her in any of the email or audio communications (Tr. 270-71). She cited the “tone” of the messages as what caused her to be “concerned” (Tr. 270).

Officer Bret Cassity received and reviewed all of the communications sent to the alderwoman, both written and recorded, during his investigation of the case (Tr. 330). At trial, he could not identify any threats of physical

harm made directly to Alderwoman Starr-Triplett (Tr. 368). Mr. Wooden's communications were an expression of his dissatisfaction with the alderwoman's representation of his ward and there was insufficient evidence presented that they were threatening (Tr. 266; 429-430; 433-34). Mr. Wooden was entitled to a judgment of acquittal because the state failed to present sufficient evidence of harassment.

In order to prove Mr. Wooden harassed Alderwoman Starr-Triplett, the state needed to provide evidence beyond a reasonable doubt he "knowingly use[d] coarse language offensive to one of average sensibility and thereby [put] [Alderwoman Starr-Triplett] in reasonable apprehension of offensive physical contact or harm" RSMo §565.090.1 (2) (2010). The jury was provided with the following verdict director for Count I:

"As to Count I, if you find and believe from the evidence beyond a reasonable doubt:

First, that on or between February 19, 2011 and February 21, 2011, in the City of Saint Louis, State of Missouri, the defendant communicated with Kacie Starr-Triplett, and second, that when communicating with Kacie Starr-Triplett, the defendant knowingly used coarse language to one of average sensibility, and third, that the defendant thereby put Kacie Starr-Triplett in

reasonable apprehension of physical contact or harm, then you will find the defendant guilty under Count I of harassment. “

(LF 122).

Coarse language, offensive to one of average sensibility

There was no doubt there were email communications between Mr. Wooden and Alderwoman Starr-Triplett. Mr. Wooden acknowledged this in his testimony (Tr. 429). However, there was insufficient evidence presented that those emails contained “coarse language to one of average sensibility”.

State v. Koetting raised the question of whether the expression “son of a bitch” was coarse language and offensive to support a charge of telephone harassment. 691 S.W. 2d 328 (Mo. App. E.D. 1985). Mr. Koetting argued that the expression was so common that it had lost its meaning and was not “coarse language”. This court disagreed and stated “[c]oarse language directed specifically to an average person is likely to be offensive.” *Id* at 331. The state presented no evidence Mr. Wooden directed any coarse language specifically towards Alderwoman Starr-Triplett. In fact, the emails and attached audio files were sent to dozens of people within city, state and federal government. Both Alderwoman Starr-Triplett and Det. Cassity testified about biblical references and vague references to violence. The state failed to present sufficient evidence of this element of Count I.

Alderwoman Starr-Triplett's fear of physical harm was not reasonable

In *Koetting*, the court determined that the victim's fear was reasonable and it was the defendant's intent to cause that fear based upon a specific threat directed towards the victim (691 S.W. 2d 328, 330). Mr. Wooden's case can be distinguished from *Koetting* in several significant ways.

First, there was insufficient evidence of a direct threat to Alderwoman Starr-Triplett. Several portions of State's Exhibit 10 were played for the jury during the direct examination of Alderwoman Starr-Triplett (Tr. 232-38). The alderwoman identified portions of the tape that caused her "concern" and made her feel "threatened" (Tr. 238-39). She specifically stated that the general references to "Gabrielle Giffords" and the "sawed-off shotgun" were threatening (Tr. 238). However, unlike in *Koetting*, these statements were general, not made specifically made towards her and there was insufficient evidence presented that it was Mr. Wooden's intention to cause fear. In fact, Mr. Wooden testified to the contrary, that he never intended to harm the alderwoman (Tr. 434). Mr. Wooden was expressing dissatisfaction with Alderwoman Starr-Triplett's representation of her constituents. Considering the entire context of the audio recordings and the lack of specific threats to cause physical harm, there was insufficient evidence that the alderwoman's fear was reasonable.

CONCLUSION

WHEREFORE, Mr. Wooden respectfully requests this Court reverse his convictions because his convictions violate his constitutional right to speak freely. In the alternative, Mr. Wooden respectfully requests that the Court remand for a new trial on Count I.

Respectfully submitted,

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ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

Pursuant to Missouri Supreme Court Rule 84.06(h) and Special Rule 363, I hereby certify that on this 16th day of August, 2012, an electronic copy of the foregoing was sent through the Missouri Courts e-Filing System to the Office of the Circuit Attorney for City of Saint Louis at mcdonaldj@stlouis.cao.org.

/s/ Amanda Faerber
Amanda Faerber

CERTIFICATE OF COMPLIANCE

Pursuant to Missouri Supreme Court Rule 84.06(c), I hereby certify that this brief includes the information required by Rule 55.03 and that it complies with the page limitations of Special Rule 360. This brief was prepared with Microsoft Word for Windows, uses Times New Roman 13 point font, and does not exceed 15,500 words, 1,100 lines, or fifty pages. The word-processing software identified that this brief contains 6,075 words, 678 lines, and 35 pages including the cover page, signature block, and certificates of service and of compliance. In addition, I hereby certify that this document has been scanned for viruses with Symantec Endpoint Protection Anti-Virus software and found virus-free.

/s/ Amanda Faerber
Amanda Faerber

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

STATE OF MISSOURI,)
)
 Respondent,)
)
 vs.) Appeal No. ED97955
)
 MARK ANTHONY WOODEN, SR,)
)
 Defendant.)

APPELLANT'S APPENDIX

Sentence and JudgmentA1
Mo. Const. Art. I, §8.....A2
Mo. Rev. Stat. 565.090.1 (2010)A3
Jury Instruction no. 5A4

MISSOURI CIRCUIT COURT
TWENTY-SECOND JUDICIAL CIRCUIT
(ST. LOUIS CITY)

STATE OF MISSOURI

Plaintiff,

Date 1/10/12

vs:

Cause No. 122-020931

Mark Wooden

Division No. 24

SS#
Defendant

SENTENCE AND JUDGMENT

Defendant appears in person and by attorney, BIM Marsh State of Missouri appears by Assistant Circuit Attorney, Jerry McDonald

PSI report received and examined by the Court.

Whereupon, said defendant is informed by this Court that he/she has heretofore on the 10 day of January, 20 12:

been found guilty by the Jury/Court of Harassment (2 counts); Possession
 pled guilty to the (amended) offense(s) of _____, a Class A ((felony/misdemeanor)), committed on 2/9/11-2/24/11, and being now asked by the Court if he/she has any legal cause to show why sentence and judgment should not be pronounced against him/her according to the law, and still failing to show such cause, it is therefore the Sentence, Order and Judgment of this Court that Mark Wooden, Defendant, in accordance with the punishment hereto assessed by the ((Jury), (Court)), be and is hereby ordered committed to the:

Missouri Department of Corrections and Human Resources;

St. Louis Medium Security Institution;

for a period of 1 day for the offense of Harassment

for the offense of Harassment; and 1 day for the offense of Possession; said sentences to be served ((concurrently), (consecutively)).

The Court suspends the ((imposition), (execution)) of sentence. Defendant is to be placed on probation per line below checked condition(s), for a period of _____

CONDITIONS OF PROBATION/SENTENCE

Fine is assessed at \$ _____

Court cost to be taxed against defendant and execution issued thereon.

Court cost waived.

Clerk's \$5.00 Crime Victim Compensation Fee is assessed against defendant and execution issued thereon.

VCCF of \$ 16 is assessed against the defendant.

Probation is to be supervised by the State Board of Probation and Parole.

Amounts due are payable through the Office of Probation and Parole.

Defendant to appear for payment on _____

Other: _____

FILED
JAN 10 2012
22ND JUDICIAL CIRCUIT
CIRCUIT CLERK'S OFFICE
BY _____ DEPUTY

Defendant advised of his/her rights under Rule 24.035/29.15; (no probable cause found) (probable cause found).

Attorney For The State

Defendant

Attorney For the Defendant

SO ORDERED:

Judge

Judge's No. 32771

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court, at office in the city of St. Louis, this _____ day of _____, 20 _____

M. JANE SCHWEITZER
Circuit Clerk

By: _____
Deputy Clerk



Missouri Constitution

Article I BILL OF RIGHTS Section 8

August 28, 2011

Freedom of speech--evidence of truth in defamation actions--province of jury.

Section 8. That no law shall be passed impairing the freedom of speech, no matter by what means communicated; that every person shall be free to say, write or publish, or otherwise communicate whatever he will on any subject, being responsible for all abuses of that liberty; and that in all suits and prosecutions for libel or slander the truth thereof may be given in evidence; and in suits and prosecutions for libel the jury, under the direction of the court, shall determine the law and the facts.

Source: Const. of 1875, Art. II, § 14.

(1951) Where employees at election under federal law had rejected union as their representative, picketing of employer for purpose of coercing employer to recognize such union was unlawful and consequently not within protection of free speech provisions. *Kincaid-Webber Motor Co. v. Quinn*, 362 Mo. 375, 241 S.W.2d 886.

(1952) Picketing, for the purpose of coercing employer to sign contract recognizing as exclusive collective bargaining agent a labor organization of which only small minority of employees of such employer were members, was for an unlawful purpose under federal statute and therefore could be restrained without violating free speech guarantees of constitution. *Katz Drug Co. v. Kavner (Mo.)*, 249 S.W.2d 166.

(1955) Petition in libel action is subject to motion to dismiss but the function of the court is limited to a determination of whether the alleged libelous matter set forth in petition is capable of defamatory meaning. *Coots v. Payton*, 365 Mo. 180, 280 S.W.2d 47.

(1955) Where evidence disclosed no reasonable objective of peaceful picketing other than to cause the employer to violate its employees' rights by coercing them into union membership it was unlawful and would be enjoined. *Bellerive Country Club v. McVey*, 365 Mo. 477, 284 S.W.2d 492.

(1956) Where one union was certified by federal authorities as bargaining representative of employees, another union, its officers and a newspaper publisher, who circulated pamphlets stating that members of the second union were not employed by the employer and urging the public not to purchase the employer's products for the purpose of preventing the sale of such products were engaging in an unlawful boycott and such circulation may be enjoined. *Adams Dairy, Inc. v. Burke (Mo.)*, 293 S.W.2d 281.

(1961) City ordinance denouncing the offense of selling, attempting to sell, or possessing with the intent to sell, obscene literature held unconstitutional because it did not require proof of knowledge of the person so possessing or selling such matter as an element of the offense. *City of St. Louis v. Williams (Mo.)*, 343 S.W.2d 16. Reversed, 367 U.S. 717, 81 S. Ct. 1708. (See also *Mo. L. Rev.*, Vol. XXVI, p. 501 for note.)

(1964) It is proper for the court to instruct the jury to the general effect that even though the court has instructed them on the question of libel or no libel the constitution gives them the right to determine the law and the facts on that issue. *Dyer v. Globe-Democrat Publishing Co. (Mo.)*, 378 S.W.2d 570.

(1969) Public employer could not lay off or reduce pay of municipal employees to intimidate them for joining labor organization. *State ex rel. Missey v. City of Cabool (Mo.)*, 441 S.W.2d 35.



Missouri General Assembly

Missouri Revised Statutes

Chapter 565 Offenses Against the Person Section 565.090

August 28, 2011

Harassment.

565.090. 1. A person commits the crime of harassment if he or she:

- (1) Knowingly communicates a threat to commit any felony to another person and in so doing frightens, intimidates, or causes emotional distress to such other person; or
- (2) When communicating with another person, knowingly uses coarse language offensive to one of average sensibility and thereby puts such person in reasonable apprehension of offensive physical contact or harm; or
- (3) Knowingly frightens, intimidates, or causes emotional distress to another person by anonymously making a telephone call or any electronic communication; or
- (4) Knowingly communicates with another person who is, or who purports to be, seventeen years of age or younger and in so doing and without good cause recklessly frightens, intimidates, or causes emotional distress to such other person; or
- (5) Knowingly makes repeated unwanted communication to another person; or
- (6) Without good cause engages in any other act with the purpose to frighten, intimidate, or cause emotional distress to another person, cause such person to be frightened, intimidated, or emotionally distressed, and such person's response to the act is one of a person of average sensibilities considering the age of such person.

2. Harassment is a class A misdemeanor unless:

- (1) Committed by a person twenty-one years of age or older against a person seventeen years of age or younger; or
- (2) The person has previously pleaded guilty to or been found guilty of a violation of this section, or of any offense committed in violation of any county or municipal ordinance in any state, any state law, any federal law, or any military law which, if committed in this state, would be chargeable or indictable as a violation of any offense listed in this subsection.

In such cases, harassment shall be a class D felony.

3. This section shall not apply to activities of federal, state, county, or municipal law enforcement officers conducting investigations of violation of federal, state, county, or municipal law.

(L. 1977 S.B. 60, A.L. 2008 S.B. 818 & 795)

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Missouri General Assembly

INSTRUCTION NO. 5

As to Count I, if you find and believe from the evidence beyond a reasonable doubt:

First, that on or between February 19, 2011, and February 21, 2011, in the City of Saint Louis, State of Missouri, the defendant communicated with Kacie Starr-Triplett, and

Second, that when communicating with Kacie Starr-Triplett, the defendant knowingly used coarse language offensive to one of average sensibility, and

Third, that the defendant thereby put Kacie Starr-Triplett in reasonable apprehension of physical contact or harm,

then you will find the defendant guilty under Count I of harassment.

However, unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of that offense.

Submitted by State (Modified as to 565.090)