

CASE NO. A-23-027

IN THE NEBRASKA COURT OF APPEALS

STATE OF NEBRASKA,

Appellee,

v.

CHAD W. WRIGHT,

Appellant.

APPEAL FROM THE DISTRICT COURT
OF LANCASTER COUNTY, NEBRASKA

Before the Honorable Judge Lori A. Maret

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES3

PROPOSITIONS OF LAW3

ARGUMENT.....3

 I. APPELLANT DISPUTES APPELLEE’S
 CHARACTERIZATION OF THE FACTS PRESENTED IN
 APPELLEE’S STATEMENT OF FACTS3

 II. THERE WAS INSUFFICIENT EVIDENCE ADDUCED TO
 SUPPORT THE COUNTY COURT’S FINDING APPELLANT
 GUILTY OF DISTURBING THE PEACE AND LOITERING
 AND TRESPASS.....5

 III. MR. WRIGHT RECEIVED INSUFFICIENT COUNSEL AT
 TRIAL.....7

CONCLUSION.....8

CERTIFICATE OF WORD COUNT.....9

TABLE OF AUTHORITIES

Appellant does not cite any additional authorities for the Reply Brief of Appellant.

PROPOSITIONS OF LAW

Appellant does not have any additional Propositions of Law for the Reply Brief of Appellant.

ARGUMENT

I. APPELLANT DISPUTES APPELLEE'S CHARACTERIZATION OF THE FACTS PRESENTED IN APPELLEE'S STATEMENT OF FACTS.

Appellant disputes Appellee's characterization of the facts presented in Appellee's Statement of Facts. Appellee states in Paragraph 5 of Appellee's Statement of Facts that Appellant entered the store, states in Paragraph 7 that Appellant exited the store and returned, and then states in Paragraph 13 that the Appellant reentered the store. Brief of Appellee, at 5, 6. The facts show that Mr. Wright entered the store and had a brief conversation with employee Jeannie Pickrel before exiting the store and re-entering the store for the second and final time about two to five minutes later. (14:5-7; 47:1-5; 27:21-22; 45:24-25; 46:4-8; 49:1-11). To the extent that Appellee suggests Mr. Wright entered the store a third time or suggests that the events listed in Paragraphs 7 through 12 occurred before Mr. Wright entered the store for the second time, Appellant disputes this characterization of the facts.

Appellee states in Paragraph 11 of Appellee's Statement of Facts that the Appellant "did not immediately leave when Homstad asked him to leave" Brief of Appellee, at 6. The closed-circuit television ("CCTV") footage from the store's security camera, which was accepted by the trial court as Exhibit 1, captured the entire encounter from the time Mr. Wright re-entered the store to the time Mr. Wright left the store for the last time, and showed that Mr. Wright was in the store (the second time) for one minute and thirty-two seconds. (E1; 81:10-14). Mr. Homstad testified that he did not remember "telling" Mr. Wright to leave, but

instead was “suggesting” that Mr. Wright leave the store up until the two men were in the store vestibule, at which point Mr. Homstad demanded that Mr. Wright leave and was no longer “suggesting” that he leave. (60:1-8; 76:13-24; 90:1- 16). Only four or five seconds passed from the time Mr. Homstad first unequivocally demanded Mr. Wright to leave the store to the time the men had exited the store. (88:21-25; 89:1-4).

Appellee states in Appellee’s Statement of Facts that that Mr. Wright called Mr. Homstad names and poked Mr. Homstad in the abdomen in the vestibule to the store as both men were exiting the store, and that Mr. Wright “sucker punched” Mr. Homstad in the abdomen after both men had fully exited the store. Brief of Appellee, at 7. The videos showing the exchange between Mr. Wright and Mr. Homstad in the store, in the vestibule, and outside the store, which were played and accepted into evidence at trial, do not show that Mr. Wright physically touched Mr. Homstad. (E1; E2). Mr. Wright denied ever touching Mr. Homstad; in fact, at the time of the alleged poking, Mr. Wright had his phone in one hand and had his other hand in his pocket. (147:14- 18; 148:5-14). Mr. Wright denied calling Mr. Homstad names. (79:2-8). Ms. Pickrel testified that she did not hear Mr. Wright call Mr. Homstad names even though she was only four or five feet away from the two at the time, and despite the fact that Mr. Homstad claimed Mr. Wright was speaking loudly during the alleged name-calling. (20:6-15; 64:1-15; 72:9-11). Virtually all, if not all, of the interaction between Mr. Wright and Mr. Homstad outside of the store was recorded and does not show Mr. Wright physically touching Mr. Homstad or asking if Mr. Wright had “lost his mind” as claimed by Mr. Homstad. (E1; E2).

Appellee states in Paragraph 25 of Appellee’s Statement of Facts that Appellant “understood that Homstad told him to leave the store at the beginning of their interaction as Homstad approached when Appellant asked for the manager.” Brief of Appellee, at 8. Mr. Wright did not understand that Homstad “told him to leave the store;” instead, Mr. Wright testified that Mr. Homstad “suggested that [Mr. Wright] leave.” (145:1-16). Further, Mr. Homstad did not approach Mr. Wright until the final seconds of their interaction, not at the beginning of their interaction. (E1; 145:1-16).

II. THERE WAS INSUFFICIENT EVIDENCE ADDUCED TO SUPPORT THE COUNTY COURT'S FINDING APPELLANT GUILTY OF DISTURBING THE PEACE AND LOITERING AND TRESPASS.

- a. *There was insufficient evidence to convict and find Mr. Wright guilty of Disturbing the peace.*

Appellee argues that Mr. Wright disturbed the peace of Office Depot and/or Timothy Homstad, and specifically points to the effects of Mr. Wright's conduct on Mr. Homstad, employee Dalton Gregory, and a customer who was checking out at the time of the interaction. Brief of Appellee, at 9-10. At the time Mr. Wright entered the store for the second time, Ms. Pickrel did not have any customers at her register. (E1). The customer whom Ms. Pickrel assisted while Mr. Wright was in the store approached Ms. Pickrel's checkout register, which was only five to ten feet away from Mr. Wright once Mr. Wright and Mr. Homstad were already talking. (E1). Mr. Wright's actions did not prevent the customer from proceeding to check out and purchase her items and did not interrupt Ms. Pickrel from doing her job, nor did they interfere with the customer buying her items. She was able to finish the customer transaction while Mr. Wright was in the store. (21:2-14; 22:24-23:1).

Similarly, another employee, Dalton Gregory, gave testimony reflecting that Mr. Wright in fact had not acted in such a way that disturbed his peace. Mr. Gregory testified that he was not afraid when Mr. Wright was in the store. (109:19-20). Moreover, he did not feel threatened while Mr. Wright was in the store. (109:25-110:2). At most, Mr. Gregory was "distracted" for only a few minutes because he wanted to observe Mr. Wright's conversation with the store manager, Mr. Homstad. (109:6-11). Mr. Gregory must not have found this incident too significant or upsetting, as he did not even remember what was exactly said between Mr. Wright and the store manager. (112: 13-19). Mr. Gregory was not confused, did not feel as though he was in disorder, and did not state that Mr. Wright interrupted his settled state. Mr. Gregory's testimony does not demonstrate that his peace was disturbed. He was merely "distracted" from his work because he chose to pay attention to what the Store Manager and Mr. Wright were discussing.

Appellee points out that Mr. Wright raised his voice during the interaction with Mr. Homstad. Brief of Appellee, at 9. There was testimony that Mr. Wright and Mr. Homstad were speaking to each other in raised voices. (19:15-18; 21:1-3). However, Mr. Homstad started the interaction with Mr. Wright by yelling at Mr. Wright from about twenty-five feet across the store; Mr. Wright was simply responding to Mr. Homstad's questions loudly enough so that Mr. Homstad would be able to hear. (14:5-7; 47:1-5; 49:1- 11).

Furthermore, Mr. Homstad's testimony is directly contradicted by video evidence. Mr. Homstad claimed that Mr. Wright "sucker punched" him and Mr. Homstad asked "if [Mr. Wright] lost his mind" while outside of the store within the eighteen seconds the two men were outside. (88:4-10). Mr. Homstad also alleged during this time Mr. Wright said he was going to sue and get a lawyer. (70:13-15). However, the approximately eighteen second video capturing the two men outside demonstrates that Mr. Wright in fact did not have any physical contact with Mr. Homstad outside, Mr. Homstad never asked if he lost his mind, and Mr. Wright never made the statements the witness claims he said. (E2).

There is no evidence that Mr. Wright at any point made physical contact with Mr. Homstad other than Mr. Homstad's own testimony, which was inconsistent with the other employees present on the day at issue. Mr. Homstad provided inconsistent testimony about where Mr. Wright allegedly called him derogatory names; initially he testified that the name calling occurred in the vestibule to the store, but he later claimed that the name calling happened while the two men were inside the store. (67:2-25; 72:9-11). Given these inconsistencies, there was insufficient evidence to find that Mr. Wright did these things let alone disturbed the peace.

b. *There was Insufficient Evidence to Find Mr. Wright Guilty of Loitering and Trespass*

Appellee contends Mr. Wright entered the Office Depot property "despite having just been put on actual notice that he was not permitted to be in the store without a mask," because he was told by employee Jeannie Pickrel that "he needed to wear a mask to be in the store." Brief of Appellee, at 10-11. This is not accurate. Ms. Pickrel never told Mr. Wright to leave the store, and she testified that it was not store policy to ask customers to leave because they will not wear a mask. (27:22-25; 28:1-4).

When Mr. Wright entered the store, Ms. Pickrel informed Mr. Wright that the store had masks available for him because the City's mask mandate was still in effect, but she was not requiring he put one on. (10: 22-24; 27: 23-23). Ms. Pickrel told Mr. Wright that the CDC no longer had a mandate requiring Mr. Wright to wear a mask. (10:22-25; 11:1-5). Ms. Pickrel did not tell Mr. Wright that he needed to wear a mask to be in the store; instead, she testified that she told Mr. Wright "If you need a mask, they're on this table." (27:13-20). Ms. Pickrel testified that the Office Depot's policy was to allow shoppers to shop in the store without wearing a mask. (32:18-20).

Further, Ms. Pickrel and Mr. Homstad did not tell Mr. Wright that he was not allowed to be in the store without a mask, but that he could not "shop" unless he wore a mask; the employees repeatedly stressed to Mr. Wright that if he did not wear a mask, an employee could do his shopping for him. (50:23-25; 51:8-10; 55:2-4; 142:13-16). Mr. Wright reasonably understood from the employees' comments that, while he was not allowed to go shopping in the store without wearing a mask, he was not prohibited from being physical present and discussing the mask policy with the employees at the front of the store. As such, Mr. Wright did not have actual notice that he was not permitted to be in the store without a mask.

III. MR. WRIGHT RECEIVED INSUFFICIENT COUNSEL AT TRIAL.

Mr. Wright received ineffective assistance of counsel at his trial. As part of discovery, the State provided Mr. Wright's attorney with a twelve minute and forty second video (the "Video Police Report") of the body camera footage from the police officer who visited the Office Depot after Mr. Wright had left the store. Appellee correctly notes that the Video Police Report is not in the record. Brief of Appellee, at 11. However, the video is not in the record precisely because Mr. Wright's trial attorney did not offer it as an exhibit at trial—this failure to offer the video as an exhibit is the very conduct that Appellant alleges amounts to trial counsel's ineffective assistance of counsel. The Video Police Report contained exculpatory material and impeachment material which would have changed the result of the proceeding if offered. Because of Mr. Wright's trial attorney's

deficient performance, the Video Police Report was not offered as an exhibit at trial, and thus it is not part of the record on appeal.

Moreover, Mr. Wright's trial counsel performed deficiently by failing to move for a new trial. Mr. Wright's trial counsel could have moved for a new trial on the grounds that the verdict was not supported by sufficient evidence as discussed above. As such, there is a reasonable probability that the County Court Judge would have granted Mr. Wright's motion for new trial, and Mr. Wright's trial attorney's failure to move for a new trial amounts to ineffective assistance of counsel. In addition, had Mr. Wright's trial counsel moved for a new trial, he could have offered the Video Police Report as an exhibit at the hearing, and if accepted, the Video Police Report would have been part of the record on appeal.

CONCLUSION

For the above stated reasons, Appellant respectfully requests this Court to reverse the District Court's Order dated December 15, 2022 as well as the Order Nunc Pro Tunc issued by the District Court on January 9, 2023, and remand this matter to the District Court with directions to reverse the Orders of the County Court dated May 26, 2022, and June 3, 2022, and to dismiss the State's Complaint against Mr. Wright.

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

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Certificate of Service

I hereby certify that on Friday, May 05, 2023 I provided a true and correct copy of this *Reply Brief* to the following:

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