NOT FINAL UNTIL TIME EXPIRES FOR REHEARING AND, IF FILED, DETERMINED

ON APPEAL TO THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA IN AND FOR PINELLAS COUNTY

APPELLATE DIVISION

JEREMIAH GERARD CARMODY

Appellant,

Appeal Case No.: CRC 08-00035 APANO
UCN No.: 522007MM007621XXXXNO

v.

STATE OF FLORIDA

Appellee.
_____/

Opinion filed: 12/2/09

Appeal from the County Court
for Pinellas County
County Judge Susan P. Bedinghaus

Nathanial B. Kidder
Attorney for the Appellant

Bernie McCabe, Esquire
State Attorney, Sixth Judicial Circuit of Florida
Attorney for Appellee

ORDER AND OPINION

PER CURIAM

Appellant was cited for disorderly conduct. He filed a Motion to Dismiss the charges based First Amendment grounds. He also filed a Motion to Suppress. The trial judge denied both motions. The Appellant went to trial and moved for a judgment of acquittal, on First Amendment

grounds. The judge also denied that motion and the jury convicted Appellant. He now appeals the judgment and the sentence and raises the denial of all the previous motions as error. This Court finds those arguments without merit based on the facts of the case. However, Appellant also requested a special jury instruction at trial on the First Amendment implications of disorderly conduct and the trial judge refused to give the instruction. This court finds that the failure to give the special jury instruction constitutes reversible error.

The standard by which this court reviews the denial of a special jury instruction is "whether there is a reasonable possibility that the jury could have been misled by the failure to give the instruction." *Cronin v. State*, 470 So.2d 802, 804 (Fla. 4th DCA 1985). In determining whether the jury could have been misled, the "yardstick is clarity." The jury must fully understand the law. *Perlman v. State*, 731 So.2d 1243, 1246-47 (Fla. 1999). The failure to give a special instruction as requested by the defendant is reversible error if the defendant can show three elements: 1) the requested jury instruction accurately states the applicable law, 2) the facts in the case support giving the instruction, and 3) the instruction was necessary to allow the jury to properly resolve all issues in the case. *Mills v. State*, 949 So.2d 1186,1188 (Fla. 1st DCA 2007). This Court finds that the present case meets these standards.

In the instant case, the Appellant was cited with a notice to appear for disorderly conduct based particularly on yelling obscenities and the word "faggot" into a crowd of people. The evidence heard at trial was that the Appellant was yelling profanities into the crowd. The yelling was loud enough to catch the officer's attention and the attention of nearby patrons. The Appellant began yelling at the officer "arrest me" and "frisk me" while throwing himself on the hood of the detective's car. And other patrons were videotaping the incident on their phones. Florida Statute §877.03 states:

> Whoever commits such acts as are of a nature to corrupt the public morals, or outrage the sense of public decency, or affect the peace and quiet of persons who may witness them, or engages in brawling or fighting, or engages in such conduct as to constitute a breach of the peace or disorderly conduct, shall be guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.

However, Florida courts have interpreted this statute with regard to protected speech under the First Amendment. Specifically, *State v. Saunders*, 339 So.2d 641 (Fla. 1976), limits disorderly conduct through speech alone to speech which inflicts injury or tends to incite an immediate breach of the peace, or which is known to be false and endangers the safety of the public. In other words, speech is not protected if it is equivalent to "fighting words" or shouting "fire" in a crowded theatre. *Saunders*, 339 So.2d at 644. To be "fighting words" the speech must incite a reaction which is more than just curiosity from the crowd, or incite another person to engage in an immediate breach of the peace. *Smith v. State*, 967 So.2d 937, 940 (Fla. 2d DCA 2007).

In the instant case, the instructions that were read to the jury included:

> To prove the crime of disorderly conduct, the State must prove the following two elements: 1) Defendant, Jeremiah Carmody, did commit acts that are of a nature to corrupt the public morals, or outrage the sense of public decency, or affect the peace and quiet of persons who may have witnessed them, to wit, by screaming obscenities and/or fighting words. 2) This conduct constituted a breach of the peace or disorderly conduct.

It is disputed between the parties whether the instruction was previously agreed upon, however, it is undisputed from the record that before the reading of the instruction, Appellant requested a special jury instruction. The Appellant argued to the trial judge that "based on the state's theory we do have to tell the jury that words alone generally will not support a conviction for disorderly conduct and that there must be evidence of something more than loud or profane language and belligerent attitude to support a conviction for disorderly conduct." (TT. 177-178). Although the

trial judge agreed with the Appellant's statement of the law, she denied the request for the special jury instruction because "the standard instructions tracks the statutes sufficiently" and she felt there was "no need to add language from cases" to the instruction.

In order to be entitled to a special jury instruction, the Appellant must prove, "(1) the special instruction is supported by the evidence; (2) the standard instruction did not adequately cover the theory of the defense; and (3) the special instruction was a correct statement of the law and not misleading." *Hudson v. State*, 922 So.2d 96, 112 (Fla. 2008). Here, the Appellant's theory of the case was that even though he was yelling or screaming obscenities, his speech was protected by the First Amendment as explained in *Saunders*. The instruction given to the jury by the trial judge was inconsistent with the limitations of *Saunders*. The special instruction Appellant requested was consistent with the *Saunders* ruling and thus the trial court erred in denying it. Under the circumstances and facts of this case, this Court finds the error was not harmless.

ACCORDINGLY, this court REVERSES the trial court's judgment and sentence and REMANDS for new trial.

ORDERED at St. Petersburg, Florida this 7 day of December, 2009.

Original order entered by Circuit Judges David A. Demers, Joseph A. Bulone, and Chris Helinger.

Copies to: Bernie McCabe
State Attorney

Nathaniel B. Kidder
Attorney for Appellant