

IN THE CIRCUIT COURT FOR THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

STATE OF OREGON,

PLAINTIFF,

vs.

JOEY GIBSON,

DEFENDANT.

No. 19CR53042

JOEY GIBSON'S
DEMURRER REPLY

REPLY

Mr. Gibson filed a demurrer based on ORS 135.630(4) “& (6) ... as the accusatory instrument is ‘is not definite and certain’, and is unconstitutional vague *as applied in this case.*” Demurrer at 1 (emphasis added).

The State’s response focused on subsection four and then exhausted itself on arguments not made in the demurrer. Once the State completed its response to the straw man argument never advanced by Mr. Gibson the State flatly ignored the “as applied” argument and gave no consideration to the unique constitutional question obviously presented by this case.¹

The State response then asked this court not to ignore the “as applied” challenge, made under subsection six, by relying on a string of cases that do not deal with subsection six or any

¹ As will be more and more evident as this case goes forward, the State has no answer to the constitutional questions presented by this case and instead is hopes to avoid the issue all together.

1 constitutional question, writing “a demurrer is not available to a defendant challenging the
2 constitutionally of a statute as applied.” STATE’S RESPONSE TO DEFENDANT’S
3 DEMURRER, at 6. However, the cases cited for this proposition simply do not deal with
4 subsection six, nor do they have anything at all to do with the First Amendment to the United
5 States Constitution and Art. I, sec. 8, of the Oregon Constitution.²

6 In Mr. Gibson’s Demurrer he presented the following authority:

7 If the accusatory instrument charges a crime implicating the First
8 Amendment to the United States Constitution or Article I, section 8,
9 of the Oregon Constitution, ***greater specificity may be required.***
10 1 *Criminal Law* 8.51 (OSB Legal Pubs 2013) (emphasis added); *citing State v.*
11 *McNamara*, 547 P.2d 598, 274 Or. 565 (Or., 1976) (Because a defendant would not
12 know what actions were criminal and which were not, one could not take the risk
13 of engaging protected expression for fear of prosecution, which could have a
14 “chilling effect on freedom of expression render[ing] the verdict vulnerable to
15 attack on constitutional grounds”)

16 Demurrer at 2. The State failed to respond in any way to *McNamara*, or the chilling effect of the
17 State’s action here.

18 As the accusatory instrument charges a crime clearly implicating the First Amendment to
19 the United States Constitution or Art. I, sec. 8, of the Oregon Constitution, greater specificity is
20 required so that Mr. Gibson can be actually informed of what he is being accused of having done.
21 The current charge is vague and uncertain as applied to Mr. Gibson.

22 //

23 //

² See e.g. *State v. Reed*, 840 P.2d 723, 116 Or.App. 58 (Or. App., 1992) (dealing with section four, not section six); *State v. Morgan*, 951 P.2d 187, 151 Or.App. 750 (Or. App., 1997) (“Thus, ORS 135.630(6) is not directly relevant to this case.”); *State v. Barker*, 914 P.2d 11, 140 Or.App. 82 (Or. App., 1996) (“Defendant’s demurrer claims that the indictment fails to state facts constituting a crime. ORS 135.630(4)”); *State v. Durant*, 857 P.2d 891, 122 Or.App. 380 (Or. App., 1993) (“defendant demurred on the ground that, when ORS 164.005(4), ORS 164.015(1) and ORS 164.105(2)”); *State v. Kurtz*, 46 Or.App. 617, 612 P.2d 749, 289 Or. 588 (Or. App., 1980) (“Defendant also assigns as error the overruling of his demurrer to the indictment for failure to state facts constituting an offense”).

Respectfully submitted this Friday, October 25, 2019.

/s/ D. Angus Lee

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DECLARATION OF COUNSEL

I, D. Angus Lee, declare under the penalty of perjury that the following is true and correct to the best of my knowledge. I am over the age of eighteen, and I am competent to testify to the matters herein. I have personal knowledge of the matters stated herein, or as indicated, have information concerning those matters. I am the attorney of record for Joseph Gibson, in the above captioned matter.

1. I have reviewed all discovery made available to me thus far in this matter.

2. Based on that review, I do not see evidence of any act that I believe is, or could reasonably be interpreted as, tumultuous and violent that is committed by Mr. Gibson.

3. Based on that review, I do not see evidence of any act that I believe is, or could reasonably be interpreted as, tumultuous and violent that is committed by Mr. Schultz.

4. I do not know with sufficient certainty to mount a defense what particular act or acts on the part of Mr. Gibson or Mr. Schultz the State refers to in the charging instrument.

5. What is clear from the discovery is that Mr. Gibson and Mr. Schultz were in a public location exercising their rights of free expression when they were assaulted by patrons of Cider Riot.

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1 6. Mr. Gibson was spat upon and pepper sprayed repeatedly.

2 7. The videos in discovery appear to show that prior to any physical contact between Mr.
3 Gibson and Ms. Clark, Mr. Gibson was moving backwards and away from Ms. Clark with his hand
4 up and arm outstretched while because she was aggressively and angrily charging and throwing
5 punches in his direction.

6 8. It does not appear that any police report or witness statement provided in discovery asserts
7 that Mr. Gibson pushed Ms. Clark or any other person.

8 9. In Ms. Clark's interview with Detective Traynor, it does not appear that she asserts she was
9 pushed by Mr. Gibson.

10 10. It appears that at no point in the discovery does Detective Traynor conclude that Mr. Gibson
11 pushed Ms. Clark.

12 11. His report appears to indicate Mr. Gibson was the opposite of violent:

13 Ms. Clark was seen to clearly take exception to Coopers actions and moved forward
14 towards Cooper. A crowd [of Antifa] followed her but their actions appeared
15 motivated by an effort to restrain Ms. Clark. Joey Gibson and Chris Ponte [are] also
16 seen to re[s]train Ms. Clark whose anger was clearly aimed at Demi Cooper.

17 12. In one recorded interview Detective Traynor admitted that he thinks it is fair to say that
18 Mr. Gibson was trying to hold her back.

19 13. Video evidence shows Mr. Gibson say "do something," but the alleged "about it" language
20 asserted in pleading by the State does not appear to exist in any video evidence or other discovery.

21 14. Based on the discovery and the indictment, it is impossible to tell which facts are referred
22 to in the indictment, and it is impossible to determine what the Grand Jury considered in returning
23 this indictment. Defendant is unable to prepare for his defense, because he does not know what
24 facts are alleged to constitute the crime in question.

1 I hereby declare that the above statement is true to the best of my knowledge and belief,
2 and that I understand it is made for use as evidence in court and is subject to penalty for perjury.

3 Signed at Vancouver, Washington, this Friday, October 25, 2019.

4 S// D. Angus Lee

5 D. Angus Lee, WSBA# 36473

6 Attorneys for Joseph Gibson

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12

1 **CERTIFICATE OF SERVICE**

2
3 I, D. Angus Lee, hereby declare under penalty of perjury under the laws of the State of
4 Oregon that the following facts are true and correct:

5
6 I am a citizen of the United States, over the age of 18 years.

7
8 On Friday, October 25, 2019, I caused this document to be served in the following
9 manner on the parties listed below:

10
11
Brad Kalbaugh () (BY FIRST CLASS US MAIL)
Multnomah County District Attorney's Office (X) (BY E-MAIL)
600 Multnomah County Courthouse () (BY FAX)
1021 SW 4th Ave () (BY HAND)
Portland OR 97204
E-mail: brad.kalbaugh@mcdca.us

/s/ D. Angus Lee