STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Case No. 97-0642

COUNTY OF KENOSHA,

Plaintiff-Respondent,

v.

C & S MANAGEMENT, INC.
d/b/a CROSSROADS NEWS AGENCY,

Defendant-Appellant.

Appeal From The Final Judgment Entered In The Circuit Court For Kenosha County, The Honorable Bruce E. Schroeder, Circuit Judge, Presiding

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I.

KENOSHA COUNTY ORDINANCE NO. 9.10.2'S BAN ON ALL "OBSCENE MATERIALS" IS CONSTITUTIONALLY OVERBROAD

The county misplaces the burden regarding validity of a law seeking to differentiate between protected and unprotected expression. While a defendant normally bears the burden of establishing beyond a reasonable doubt that a statute or ordinance is unconstitutional, "[t]he general presumption of constitutionality accorded legislation is inapplicable where the law infringes on the exercise of First

Amendment rights, and the burden of establishing the law's constitutionality is upon the government." *Schultz v. City of Cumberland*, 195 Wis.2d 554, 536 N.W.2d 192, 194 (Ct. App. 1995).

The Wisconsin appellate courts have never held that the protections provided under Wis. Const. Art. I, §3 are limited to those recognized by the United States Supreme Court under the First Amendment. *Lawson v. Housing Authority*, 270 Wis. 269, 70 N.W.2d 605, 615 (1955), held that requiring tenants to certify their non-membership in subversive organizations violated the First Amendment. Accordingly, the Court did not there have to address the precise scope of Article I, §3, and in fact did not do so.

In *State v. Bagley*, 164 Wis.2d 255, 474 N.W.2d 761, 763 n.1 (Ct. App. 1991), this Court merely referred to Article I, §3 in a footnote and then ignored it. The case certainly did not apply the careful historical analysis required in *Jacobs v. Major*, 139 Wis.2d 492, 407 N.W.2d 832, 836-37 (1987).

In fact, the Wisconsin Supreme Court has not, and legally could not, simply defer to the United States Supreme Court when construing the Wisconsin Constitution. The extensive analysis required by *Jacobs* would have been wholly unnecessary had the Supreme Court there felt that Article I, §3 merely parroted the protections of the First Amendment.

The Wisconsin Supreme Court long ago established that it was the courts of this State, not the United States Supreme Court or the courts of some other state, which bear ultimate responsibility for construing the Wisconsin Constitution. *Bashford v. Barstow*, 4 Wis. 567, 785 [*567, *758] (1855) (Smith, J.) ("Let them construe theirs

-- let us construe and stand by ours"); *see id.* at 782-85 [*755-58].

The judicial power of this state is vested in the Wisconsin Supreme Court and the lower Wisconsin courts. *See* Wis. Const. Art. VII, §2. The Wisconsin Supreme Court's role is the same within the state as that of the United States Supreme Court within the country. *Attorney General v. Blossom*, 1 Wis. 277, 280-81 (1853). It can no more delegate that role to the United States Supreme Court than it could to the District Court of Carroll County, Iowa. Accordingly "[t]o look only to the United States Supreme Court for constitutional guidance would be abdication by this court of its constitutional responsibilities." *Roberts v. State*, 458 P.2d 340, 342 (Alaska 1969); *cf. McCleary v. State*, 49 Wis.2d 263, 182 N.W.2d 512, 522 (1970) (failure to exercise discretion is abuse of discretion).

As the careful analysis for reviewing state constitutional issues in *Jacobs* recognizes,

> [i]t is the prerogative of the State of Wisconsin to afford greater protection to the liberties of persons within its boundaries under the Wisconsin constitution than is mandated by the United States Supreme Court under the Fourteenth Amendment.

State v. Doe, 78 Wis.2d 161, 254 N.W.2d 210, 215 (1977). The Wisconsin courts thus have not only the power, but the obligation independently to construe the state constitution when a United States Supreme Court decision undermines the protections of Wisconsin citizens under that constitution. *See State v. Fry*, 131 Wis.2d 153, 388 N.W.2d 565, 574 (1986); *Doe*, *supra*.

Application of the historical analysis required by *Jacobs* demonstrates that the Wisconsin Constitution permits no categorical

exception for "obscenity" from the protections of free speech guaranteed by Article I, §3. *See* Crossroads' Brief at 6-12. The county does not even attempt to rebut that showing and thus concedes the point. *See State v. Clark*, 179 Wis.2d 484, 507 N.W.2d 172, 175 (Ct. App. 1993) (arguments not refuted are deemed admitted).

II.

THE STANDARDS FOR DISTINGUISHING CONSTITUTIONALLY PROTECTED SPEECH FROM THAT BARRED UNDER KENOSHA COUNTY ORDINANCE NO. 9.10.2 ARE UNCONSTITUTIONALLY VAGUE

Crossroads' opening brief demonstrated that the definition of "obscene material" under Kenosha Ordinance No. 9.10.2 fails to provide either fair notice of the conduct prohibited or sufficient standards for adjudication. The issue here is not one of "mathematical exactitude," County's Brief at 8, but the lack of any reasonable notice or guidance concerning when a constitutionally protected expression suddenly becomes "obscene."

Given the absence of any cognizable standards in the ordinance, the county once again relies solely upon the erroneous assertion that application of the Wisconsin Constitution is controlled by the current United States Supreme Court's application of the parallel federal provision. County's Brief at 7-8. As previously discussed, however, that simply is not the case.

III.

BECAUSE CROSSROADS MADE OUT A PRIMA FACIE CASE FOR RELIEF, THE CIRCUIT COURT ERRED IN DENYING ITS DISCRIMINATORY PROSECUTION MOTIONS WITHOUT A HEARING

The grant of discretion to the district attorney concerning which cases to prosecute, County's Brief at 8-9, does not alter the fact that such discretion cannot constitutionally be exercised, as here, based upon the defendant's exercise of its constitutional rights, *e.g.*, *Wayte v. United States*, 470 U.S. 598, 608 (1985), or with the intent to discourage protected expression, *e.g.*, *United States v. P.H.E. Inc.*, 965 F.2d 848, 853 (10th Cir. 1992). Crossroads' proffer demonstrated that it and two other stores on the interstate were singled out for prosecution because they exercised their First Amendment rights (1) to sell sexually explicit materials and (2) to locate and advertise their wares along the interstate (R100; App. 119-29).

The county's conclusory response does not challenge that showing, but asserts instead that such discrimination is proper. County's Brief at 9-11. While the county may agree with the circuit court that the law barring discrimination of this type is "an example of the excesses of the '70's" (R104:44; App. 21), it remains the law and is binding on this Court. Singling out for prosecution those establishments which "walk the tightrope" by specializing in sexually explicit but constitutionally protected materials, while ignoring "mom and pop stores" which sell a wide variety of non-sexual materials in addition to items indistinguishable from those alleged here to be "obscene," is nothing less than discrimination based on the content of

the stores' non-obscene speech. Such discrimination is constitutionally impermissible. *See* Crossroads' Brief at 20-26.

IV.

THE CIRCUIT COURT ERRED BY EXCLUDING RELEVANT, ADMISSIBLE DEFENSE EVIDENCE CONCERNING THE APPLICABLE COMMUNITY STANDARD

The county here takes the position that it is more fair and reliable in assessing "statewide community standards" to require twelve members of a jury chosen from a single county to rely solely upon their own, necessarily limited knowledge and understanding of statewide attitudes regarding sexually explicit materials, rather than to taint them with reliable evidence of what the statewide community actually thinks. That position is wrong, both as a matter of simple logic and under Wisconsin's law of evidence.

A. Admissibility of Community Standards Survey and Expert Testimony

The county does not appear to dispute that community standards surveys in general can be relevant and helpful to the jury in deciding the issue of obscenity. Nor does it dispute either Dr. Scott's expertise or the fact that the survey was properly conducted. Rather, it appears to assert that certain of the survey questions are irrelevant or misstate the law. The county is wrong.

58.4% of the survey respondents (63.6% of those with an opinion) agreed "that the portrayal of sexual conduct in X-rated videos and sexually explicit magazines, as described, is acceptable in

Wisconsin for those adults who may want to obtain and view them" (R54:Exh.B:43). Similarly, 72% (79.8% of those with an opinion) responded that it is acceptable in Wisconsin for such videos and magazines to be sold or rented to adults who request such material (*id.*:44). This is exactly the type of information which the county claims is proper survey evidence, yet it still objects on various grounds.

The county objects, for instance, that the survey's description of the materials at issue is lacking:

> The next few questions deal with adult x-rated videos and sexually explicit magazines. These videos and magazines may have little or no plot. Their contents are primarily graphic depictions of nudity and sex, showing a variety of actual sexual activities, including: vaginal intercourse, ejaculation, bondage, oral sex, masturbation, anal sex, use of vibrators, lesbian sex, group sex and variations of these by adult performers.
> . . .

(R54:Exh.B:41).

It is difficult to imagine how the description could be any more complete, and the county fails to suggest any improvements. Instead, it appears that the county simply wants to ban *any* survey unless the very material on trial is shown to each respondent. That is not the law, however, *see* Crossroads' Brief at 32, nor is it reasonable.[1] Surveys in such cases are not to judge a particular work, but to determine the general community standard by which the particular work is to be judged (R48:37; App. 53), and this definition

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[1] Besides being neither practical nor necessary, conducting such a survey presumably could subject the pollster to civil or criminal penalties for exhibiting obscene materials. Wis. Stat. §944.21.

adequately does that.[2] If anything, the fact that respondents did not view Anal Vision goes only to the weight of the evidence, not its admissibility. *E.g., Carlock v. State*, 609 S.W.2d 787, 789-90 (Tex. Cr. App. 1981)N.W.2d .

The county also complains that the survey elicited irrelevant political attitudes. The county is correct that two questions addressed the perceived political appropriateness of laws banning access to sexually explicit materials. 68.8% of all respondents (72.1% of those with an opinion on the issue) stated that adults "should be able to legally obtain and view videos and magazines depicting such sexual conduct" (R54:Exh.B:45). On the other hand, less than half stated that neighborhood video stores in Wisconsin should be allowed to rent or sell such videos to adults (*id.*:46). Contrary to the county's bald assertion, the respondents' political views regarding what should or should not be permitted are relevant, circumstantial evidence of what they in fact accept in the community.

Premising the survey questions with the fact that sexually explicit videos are only available to adults who desire them was not improper. *See* County's Brief at 14. Providing this information did not suggest any "consenting adult" defense, but instead was necessary to avoid any prejudicial misconception respondents otherwise might have concerning the recipients of the material, and therefore to focus the inquiry properly on the issue of acceptance. Just as it is

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[2] *United States v. Pryba*, 678 F. Supp. 1225 (E.D. Va. 1988), *aff'd* 900 F.2d 748 (4th Cir. 1990), is not to the contrary. The court there held that conclusory references to "bondage" did not accurately reflect the types of sadomasochistic abuse at issue. *Id.* at 1229. The court did not question sufficiency of the less-inclusive definition in that case regarding more run-of-the-mill materials of the type at issue here.

important to inform the respondents that "no minors are involved," it is important to make clear that adults are not involuntarily exposed to these materials.

Question 23 likewise does not "misstate[] the law" because it asks the respondent to indicate whether adult videos and magazines appeal to the respondent's own prurient interests, rather than those of the average person applying contemporary community standards. County's Brief at 15. While it is true that *jurors* must not apply their own standards in determining the prurient interest and patently offensive prongs of the *Miller* test, the same is not true of survey respondents. Indeed, the whole point of using a survey is to learn the personal views of a representative sample of the statewide community to aid the jury in determining statewide community standards and in defining the "average person." Each individual's personal opinion, including those of the jurors (R51:148-50), contributes to the community standard.

Finally, the principal case relied upon by the county, *United States v. Pryba*, 678 F. Supp. 1225 (E.D. Va. 1988), *aff'd*, 900 F.2d 748 (4th Cir. 1990), is neither on point nor persuasive. Unlike the survey here, the survey questions in that case "were not directed at determining whether sexually explicit material enjoys community acceptance," *id.* at 1230, but rather focussed "on the general political question whether adults should be able legally to obtain pornography," *id.* at 1228. The court in *Pryba*, moreover, improperly substituted its own judgment concerning the value of the survey, rather than submitting it for the jury's consideration. In view of Wisconsin's policy of liberally admitting expert evidence which may

prove helpful to the jury, and the decisions in other jurisdictions which have recognized the usefulness of public opinion surveys in obscenity cases, the jury itself should have been permitted to determine what weight to give the community standards survey in light of Dr. Scott's testimony and the county's objections to the survey.

The court in *Pryba* also failed to consider whether testimony concerning the survey was admissible under Fed. R. Evid. 703, the federal analog to Wis. Stat. §907.03. Dr. Scott's testimony concerning his reliance on the survey was admissible under §907.03. Crossroads' Brief at 33-34.

B. Admission of Comparable Materials Accepted in the Community

The county is correct that the circuit court based exclusion of evidence of the tapes which juries previously had found not to be obscene squarely on its own conclusion that they were not comparable to that charged here. County's Brief at 16. That court, however, misused its discretion by applying an unduly restrictive standard for "comparability," Crossroads' Brief at 35-36, by reaching a patently unreasonable conclusion based upon the facts, *id.*, and by deciding the ultimate issue of comparability itself, a decision which properly must be left to the jury, *id.* at 39. Having failed to refute Crossroads' arguments on these points, the county must be deemed to have conceded them. *See Clark*, 507 N.W.2d at 175.

The county's response on the remaining materials, like the circuit court's decision excluding them, is based on the logical error that, since mere availability of similar materials does not *necessarily*

establish acceptance, such availability is irrelevant on the issue of acceptability. County's Brief at 16-17. Availability is relevant evidence of acceptability, even if it might not alone necessarily establish it. *E.g.*, *United States v. Various Articles of Merchandise*, 750 F.2d 596, 599 (7th Cir.1984); Crossroads' Brief at 36-39. Evidence need not itself establish a fact in issue so long as it tends to make that fact more or less probable. Wis. Stat. §904.01.

There is no basis, moreover, to suggest that admission of such evidence would have confused the jury or that the circuit court even based its exclusion on that ground. As things stand, the jury was forced to determine statewide community standards on an artificially limited information base, having been denied any evidence of such standards beyond its own provincial views on the subject.

V.

THE EVIDENCE WAS INSUFFICIENT TO CONVICT

The bulk of the county's argument is adequately rebutted by Crossroads' opening brief and *Luke Records, Inc. v. Navarro*, 960 F.2d 134 (11th Cir. 1992), which the county carefully ignores. Also, while instructions permitting consideration of the circumstances of dissemination have been held not to be constitutional error in the decisions cited by the county, the fact remains that such circumstances may be relevant to issues of prurience or patent offensiveness, but have no logical relevance to the question whether the videotape here has serious educational value. Either the tape has such value or it does not, and the fact Crossroads specializes in sexually explicit

materials has no tendency to make that value any more or less probable. *See* Wis. Stat. §904.01.

VI.

THE JURY INSTRUCTIONS MISSTATED THE APPLICABLE LAW AND PERMITTED CONVICTION FOR CONSTITUTIONALLY PROTECTED SPEECH

Contrary to the county's claim, County's Brief at 20-21, a "shameful, unhealthy, unwholesome, degrading or morbid interest" in sex is much broader than the "shameful or morbid interest" standard set by the Supreme Court. *See Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 498 (1985).[3] Unhealthy, unwholesome, or degrading *See, e.g.*, must mean something *other* than shameful or morbid, or the county would not have sought to include them in the instruction. Nor are they merely synonyms of "morbid." The "*psychologically* unhealthy ... *preoccupation* with unwholesome matters" which, by the county's definition, characterizes the adjective "morbid," County's Brief at 21 (citation omitted, emphasis added), is absent from the terms inserted by the circuit court at the county's insistence.

Likewise disingenuous is the suggestion that insertion of the adverb "genuinely" had no effect on the "serious . . . value" standard established by the Supreme Court. Adverbs of this type are used to modify, i.e., change, the meaning of a verb, adverb or, as in this situation, an adjective. Adding "genuinely" to the instruction necessarily imposed a higher standard, permitting conviction unless the work had not just "serious value," but "*very* serious value." By

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[3] The county's reliance on *State v. Bartenen*, 591 P.2d 546 (Ariz. 1979), is misplaced, that decision having preceded *Brockett* by six years.

use of the term "serious . . . value," moreover, the constitutional standard already avoids pretextual claims of the type cited by the county.[4]

The county's conclusory statements that the instructional errors were harmless are wrong for the reasons already stated. Crossroads' Brief at 43-44. *See also State v. Pettit*, 171 Wis.2d 627, 492 N.W.2d 633, 642 (Ct. App. 1992) (court may decline to address issue inadequately briefed).

CONCLUSION

For these reasons, as well as those in Crossroads' opening brief, the judgment should be reversed.

Dated at Milwaukee, Wisconsin, October __, 1997.

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[4] The Supreme Court's intent to protect "genuinely serious" works, *Miller v. California*, 413 U.S. 15, 23 (1973), does not alter the constitutional standard announced in that case, which asks only whether the material "lacks serious . . . value," *id.* at 24.

Respectfully submitted,

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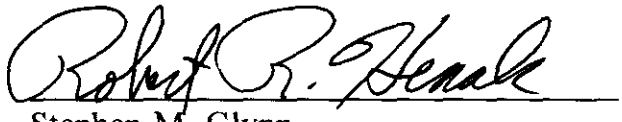

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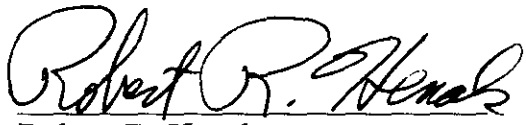
RULE 809.18(d) CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Rule 809.19(8)(b) and (c) for a reply brief produced with a proportional serif font. The length of the includable portions of this brief is 2,985 words.



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