CITY OF ROCKFORD
425 E. STATE STREET, ROCKFORD IL 61104

CITY OF ROCKFORD.	)	
	)	
Plaintiff,	)	DOCKET #: 0888220241010105452
	)	CASE # RP24-027986
vs.	)	TICKET # C0882003023
	)	HEARING DATE: 2/14/2025
KEVIN J. RILOTT	)	
	)	
Defendant.	)	

MOTION TO DISMISS

1. Kevin Rilott's Actions Occurred in a Traditional Public Forum.

The City of Rockford owns the alley adjacent to 611 Auburn Street in trust for the use of the public. The original 1890 Plat of the Harlem Park subdivision, which includes the lot at 611 Auburn Street, shows this. The dedication accompanying the Plat of the subdivision states that its "streets and alleys [are] for the use of the public". See Exhibit 1.

The City of Rockford continues to own title to the alley in trust for use of the public, according to a December 10, 2024 title commitment from Chicago Title Insurance Company.

Illinois law (410 ILCS 25/3) defines "Public way" to mean "any street, alley, or other parcel of land open to the outside air leading to a public street, which has been deeded, dedicated, or otherwise permanently appropriated to the public for public use, and which has a clear width and height of not less than 10 feet (3048 mm)." The 16-foot alley adjacent to 611 Auburn is therefore a "public way" under Illinois law.

The alley is used as a public way since access to the parking lot behind the commercial establishment at 611 Auburn Street can be had only through the alley.

Rockford City Ordinance Sec. 1-2 defines "Street" to "include any alley. . ." "unless

the context [of an ordinance] requires otherwise." The undersigned could find no ordinance section whose "context" would require "alley" to be understood other than as a Street or public way.

The U.S. Supreme Court has emphasized that:

> [t]hese places [public ways and sidewalks] – which we have labeled "traditional public fora" – "'have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'" *Pleasant Grove City v. Summum*, 555 U.S. 460, 469 (2009) (quoting *Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 45 (1983)).

McCullen v. Coakley, 573 U.S. 464, 476 (2014). The Supreme Court has also recognized that a street does not lose its public character in a residential area. *Frisby v. Schultz*, 487 U.S. 474, 478-79 (1988). And in this case, the facility at 611 Auburn is a commercial establishment, and the public can access its parking lot only through the alley. Notably, the citation does not charge Mr. Rilott with trespass.

In sum, the City of Rockford owns the alley adjacent to 611 Auburn Street in trust for the public. It is a "Public way" under Illinois law. Rockford ordinances define "Street" as including an alley. Therefore, for purposes of the First Amendment, the alley at 611 Auburn Street must be considered to be a traditional public forum, in like manner as other Rockford streets and sidewalks.

2. <u>The Citation does not allege any Speech or Conduct by Mr. Rilott that Falls Outside the Protection of the First Amendment.</u>

The citation alleges that:

> On 10/10/24 Kevin J. Rilott was protesting in the residential alley way off 611 Auburn Street. Rilott was yelling, holding signs and yelling at people within the parking lot. Rilott refused to leave the alley way when requested. Rilott was disturbing the peace.

The alleged wrongful actions/speech are: "protesting", "yelling", "holding signs" and "refus[ing] to leave the alley when requested". But these actions and words are lawful in a

public forum. And Mr. Rilott had a right to remain in the alley since it was a public forum, just like a sidewalk or street. To avoid dismissal, the citation must identify words or speech that falls outside of the protection of the First Amendment i.e. "fighting words". *People v. Redwood*, 335 Ill. App. 3d 189, 193 (4th Dist. 2002). There the court dismissed a disorderly conduct charge because it did not specify any "fighting words" that, if proven, would be unprotected by the First Amendment. The citation quoted above also fails to allege any words that are unprotected by the First Amendment, and for that reason it must be dismissed.

A step back shows this case to be a classic "heckler's veto" First Amendment violation. The "hecklers" are the two people who heard and disliked Mr. Rilott's speech and called 911 to ask the police to get rid of it. The police unthinkingly obliged and ticketed Mr. Rilott for "protesting", "yelling", and "holding signs" in a traditional public forum, and not leaving the alley when ordered to do so. The police's reaction was a blatantly unconstitutional basis for speech regulation, as explained by the Seventh Circuit:

> "Listeners' reaction to speech is not a content-neutral basis for regulation." *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134 (1992). "Speech cannot . . . be punished or banned, simply because it might offend" those who hear it. *Id.* At 134-135. . . . The police must preserve order when unpopular speech disrupts it; "does it follow that the police may silence the rabble-rousing speaker? Not at all. The police must permit the speech and control the crowd; there is no hecker's veto." *Hedges v. Wauconda Community Unit Sch. Dist. No. 118,* 9 F.3d 1295, 1299 (7th Cir. 1993). *Ovadal v. City of Madison,* 416 F. 3d 531, 537 (2005).

Since the charge here shows the police responded to the heckler's veto of Mr. Rilott's First Amendment-protected speech by censoring it rather than protecting it, and the citation does not identify any "fighting words" unprotected by the First Amendment, the citation should be summarily dismissed.

Respectfully submitted,

/s/ Thomas Olp

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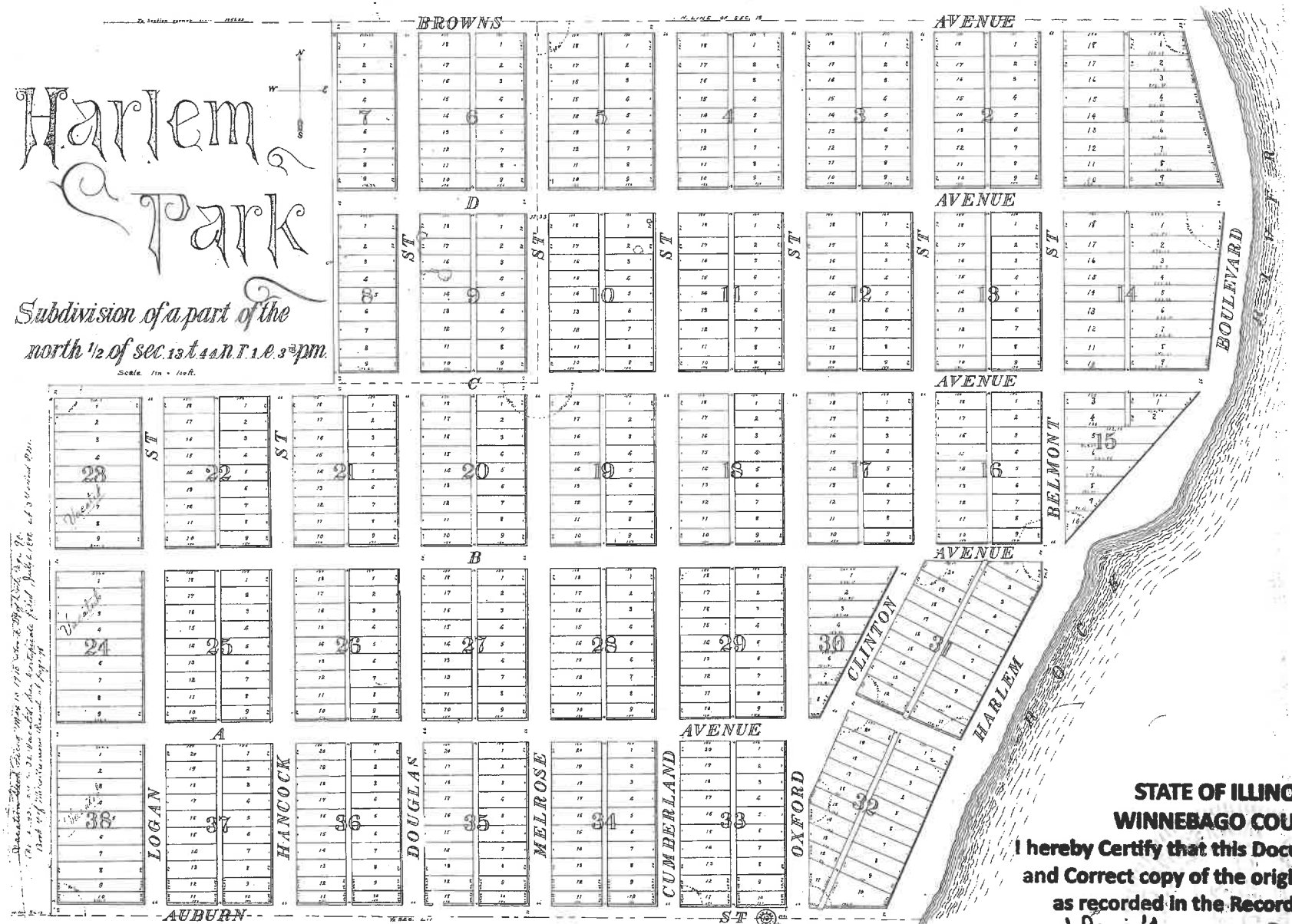
Attorney for Defendant Kevin J. Rilott

CERTIFICATE OF SERVICE OF MOTION

The undersigned certifies that he served this MOTION upon counsel for the City of Rockford by personal service on Friday, February 14, 2025.

/s/ Thomas Olp

Thomas Olp, Attorney
IL Bar # 2172703
Thomas More Society



STATE OF ILLINOIS
WINNEBAGO COUNTY
I hereby Certify that this Document is a True and Correct copy of the original Document as recorded in the Recorder's Office.
Lori Gummow Recorder
Dated: 2/7/25 # of pages 2

Rockford Ill. June 27th 1890

I Hereby Certify that I have surveyed & Subdivided a Part of the N. 1/2 of Sec. 13 T 44 N R 1. E. 3rd P. M, & that the annexed plat is a correct representation of the same. Iron Pins 3/4 long and 3/4 in diameter are placed at all block corners, and Iron pins 1 1/2 Ft. long. 3/8 in. diameter at all Lot corners.

D. C. Dunlap

Surveyor.

State of Illinois } ss.
Winnebago County }

Know all men by these presents that we the undersigned being the owners and proprietors of the tract of Land, represented by the accompanying plat & have caused the same to be subdivided platted and staked out, into Blocks, Lots, Streets, & alleys, as represented by the said plat, the streets and alleys for the use of the public. The Blocks & Lots for conveyance & selling.

Given under our hands & seals, this Eighteenth day of August 1890

William F. McCutchan —
Martha A. McCutchan —
Levi Rhoades —
Friedenka Rhoades —

State of Illinois }
Winnebago County } ss.

A. Coley M. Stavin a Notary Public in and for said County in the State aforesaid, do hereby certify that William F. McCutchan & Martha A. McCutchan his wife, Levi Rhoades & Friederika Rhoades his wife Personally known to me to be the same persons whose names are subscribed to the foregoing Instrument as having executed the same, appeared before me this day in person & acknowledged that they signed sealed and delivered the said Instrument as their free and voluntary act for the uses and purposes therein set forth.

Given under my hand & Notarial Seal this Eighteenth day of August 1890.

Coley M. Stavin
Notary Public

Notarial Seal

Filed August 20th 1890 at 11 oc A. M.

Lewis F. Lake
Co Clerk & Recorder
By Ed A Lake
Deputy.

#

People v. Redwood

Appellate Court of Illinois, Fourth District

November 20, 2002, Decided

NO. 4-02-0025

Reporter
335 Ill. App. 3d 189 *; 780 N.E.2d 760 **; 2002 Ill. App. LEXIS 1075 ***; 269 Ill. Dec. 288 ****

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, v. ERIK S. REDWOOD, Defendant-Appellee.

Subsequent History: [*1]** Released for Publication December 31, 2002.

Prior History: Appeal from Circuit Court of Champaign County. No. 99CF1667. Honorable Thomas J. Difanis, Judge Presiding.

Disposition: Trial court's judgment was affirmed.

Core Terms

disorderly conduct, breach of peace, fighting words, trial court, words, indictment, fail to state, vulgarities, charges, disturb, provoke

Case Summary

Procedural Posture
The State appealed from the dismissal of disturbance of the peace and hate crime charges against defendant by the Circuit Court of Champaign County (Illinois) for failure to state an offense as a matter of law.

Overview
Defendant alleged that his speech was protected by the First Amendment. The appellate court agreed. The indictment and information alleged only that defendant yelled, "how long are you going to be a shoe-shine boy" to an African-American male across a public street. The words contained no implied threat. While many people found the remark offensive, that was not enough to sustain an offense. The comment did not rise to the level of "fighting words," as there was no explicit or implied threat. The information charging defendant with disorderly conduct failed to state an offense. Further, because the disorderly conduct was the underlying offense for the indictment for a hate crime, both charges failed to state an offense. The trial court erred when it held that "fighting words" had to be spoken to more than one individual to cause a breach of the peace. While the statutory language implied that it sought to protect the public tranquility, the intent of the disorderly conduct statute was to guard against an invasion of the right of others not to be molested or harassed, either mentally or physically, without justification. It was not necessary that the act occur in public.

Outcome
The dismissal of the indictment was affirmed.

LexisNexis® Headnotes

Criminal Law & Procedure > ... > Disruptive Conduct > Disorderly Conduct & Disturbing the Peace > Elements

Criminal Law & Procedure > ... > Crimes Against Persons > Disruptive Conduct > General Overview

Criminal Law & Procedure > ... > Acts & Mental States > Mens Rea > Knowledge

HN1[] **Disorderly Conduct & Disturbing the Peace, Elements**

See *720 Ill. Comp. Stat. 5/26-1(a)(1)* (West 2000).

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Fighting Words

HN2[] **Freedom of Speech, Fighting Words**

Freedom of speech is a fundamental right protected

from invasion by the state by the Fourteenth Amendment. However, there are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem. These include the insulting or fighting words.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Fighting Words

Criminal Law & Procedure > ... > Disruptive Conduct > Disorderly Conduct & Disturbing the Peace > Elements

HN3[] Freedom of Speech, Fighting Words

"Fighting words" are personally abusive epithets which, when addressed to an ordinary citizen, as a matter of common knowledge, inflict injury or are inherently likely to provoke an immediate breach of the peace.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Fighting Words

Criminal Law & Procedure > ... > Crimes Against Persons > Disruptive Conduct > General Overview

HN4[] Freedom of Speech, Fighting Words

A statute that punishes spoken words alone, as § 26-1, codified at 720 Ill. Comp. Stat. 5/26-1 (West 2000), may, cannot withstand constitutional attack unless it cannot be applied to speech protected by the First and Fourteenth amendments, even if the speech punished is vulgar or offensive. Thus, § 26-1 may only be applied if the words used are "fighting words."

Criminal Law & Procedure > ... > Accusatory Instruments > Dismissal > General Overview

HN5[] Accusatory Instruments, Dismissal

A trial court may dismiss a charge in a criminal case on the grounds that the charge does not state an offense. 725 Ill. Comp. Stat. 5/114-1(a)(8) (West 2000). Dismissal of the charge on such grounds does not prevent the filing of a new charge. 725 Ill. Comp. Stat. 5/114-1(e) (West 2000).

Criminal Law & Procedure > ... > Accusatory Instruments > Indictments > Appellate Review

Criminal Law & Procedure > ... > Accusatory Instruments > Dismissal > General Overview

Criminal Law & Procedure > ... > Accusatory Instruments > Dismissal > Appellate Review

Criminal Law & Procedure > Preliminary Proceedings > Pretrial Motions & Procedures > Dismissal

Criminal Law & Procedure > Appeals > General Overview

Criminal Law & Procedure > Appeals > Right to Appeal > Government

HN6[] Indictments, Appellate Review

The State may appeal from an order dismissing a charge for any of the grounds enumerated in § 114-1, codified at 725 Ill. Comp. Stat. 5/114-1 (West 2000), of the Code of Criminal Procedure of 1963. 145 Ill. 2d R. 604(a)(1). The standard of review of a defendant's motion to dismiss an indictment is whether the indictment strictly complies with the pleading requirements of § 111-3, codified at 725 Ill. Comp. Stat. 5/111-3 (West 2000), of the Code of Criminal Procedure.

Criminal Law & Procedure > ... > Accusatory Instruments > Indictments > General Overview

HN7[] Accusatory Instruments, Indictments

Section 111-3(a)(3), codified at 725 ILCS 5/111-3(a)(3) (West 2000), of the Code of Criminal Procedure requires that an indictment adequately inform an accused of a charged offense by setting forth the nature and elements of the offense charged. The question is not whether the alleged offense could have been described with greater certainty, but whether the charge is stated with sufficient particularity to enable the accused to prepare a proper defense.

Criminal Law &

Procedure > ... > Dismissal > Grounds for Dismissal > Defective Instrument

Criminal Law & Procedure > ... > Accusatory Instruments > Dismissal > General Overview

Criminal Law & Procedure > ... > Standards of Review > De Novo Review > General Overview

Criminal Law & Procedure > ... > Standards of Review > De Novo Review > Motions to Dismiss

HN8[] Grounds for Dismissal, Defective Instrument

When addressing a defendant's motion to dismiss a charge for failure to state an offense, a trial court is limited to assessing the legal sufficiency of the charge and may not evaluate the evidence that the parties might present at trial. The appellate court reviews dismissal of an indictment de novo.

Criminal Law & Procedure > ... > Possession of Weapons > Unregistered Firearm > Elements

Criminal Law & Procedure > Criminal Offenses > Weapons Offenses > General Overview

Criminal Law & Procedure > ... > Accusatory Instruments > Dismissal > General Overview

HN9[] Unregistered Firearm, Elements

A charge that sets forth elements that do not amount to an offense may be dismissed under *§ 114-1(a)(8)*, codified at *725 Ill. Comp. Stat. 5/114-1*)a)(8) (West 2000), of the Code of Criminal Procedure.

Criminal Law & Procedure > ... > Disruptive Conduct > Disorderly Conduct & Disturbing the Peace > Elements

Criminal Law & Procedure > ... > Crimes Against Persons > Disruptive Conduct > General Overview

Criminal Law & Procedure > ... > Accusatory Instruments > Indictments > General Overview

HN10[] Disorderly Conduct & Disturbing the Peace, Elements

Where the statute does not define or describe the act or acts constituting the offense, a charge couched in the language of the statute is insufficient. Rather, the facts that constitute the crime must be specifically set forth.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Fighting Words

Criminal Law & Procedure > ... > Crimes Against Persons > Disruptive Conduct > General Overview

Legal Ethics > Prosecutorial Conduct

HN11[] Freedom of Speech, Fighting Words

The speaker's "fighting words" must contain either an explicit or implied threat and that vulgarities and epithets do not suffice to trigger the State's prosecutorial powers and criminal sanctions.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Fighting Words

Criminal Law & Procedure > ... > Disruptive Conduct > Disorderly Conduct & Disturbing the Peace > Elements

Criminal Law & Procedure > ... > Crimes Against Persons > Disruptive Conduct > General Overview

HN12[] Freedom of Speech, Fighting Words

The State may prove a breach of the peace by showing either that the defendant threatened another or that the defendant's actions had an effect on the surrounding crowd.

Criminal Law & Procedure > ... > Disruptive Conduct > Disorderly Conduct & Disturbing the Peace > Elements

Governments > Legislation > Types of Statutes

Criminal Law & Procedure > ... > Crimes Against Persons > Disruptive Conduct > General Overview

HN13[] Disorderly Conduct & Disturbing the Peace, Elements

While the statutory language makes reference to a breach of the peace, implying the public tranquility is what it seeks to protect, the supreme court has interpreted the intent of the disorderly conduct statute as seeking to guard against an invasion of the right of others not to be molested or harassed, either mentally or physically, without justification. Further, the supreme court has favorably cited the committee comments to § 26-1, codified at 720 Ill. Comp. Stat. 5/26-1 (West 1998), of the Criminal Code of 1961, which state that no attempt has been made to limit the scope of the article to public acts. Accordingly, it is not necessary that the act occur in public, only that defendant's actions disturb the public order.

Judges: JUSTICE COOK delivered the opinion of the court. KNECHT and APPLETON, JJ., concur.

Opinion by: COOK

Opinion

[*191] **[**762]** **[****290]** JUSTICE COOK delivered the opinion of the court:

In January 2002, the trial court dismissed the charges against defendant, Erik S. Redwood, for failure to state an offense as a matter of law. The State appeals. We affirm.

On October 14, 1999, defendant was indicted for a hate crime, a Class 4 felony, in that:

> "[T]he said defendant, by reason of the perceived race of Harvey Welch, knowingly committed Disorderly Conduct against Harvey Welch, in violation of 720 Illinois Compiled Statutes, 5/26-1(a)(1), in that he yelled across the street at Harvey Welch, 'How long are you going to be a shoe-shine boy?', in such an unreasonable manner as to alarm and disturb Harvey Welch and provoke a breach of the peace, in violation of 720 Illinois Compiled Statutes, 5/12-7.1."

On January 16, 2001, defendant was charged by information **[***2]** with disorderly conduct, a Class C misdemeanor, in that:

> "[T]he said defendant knowingly yelled across a street at Harvey Welch, 'How long are you going to be a shoe-shine boy?', in such an unreasonable manner as to alarm and disturb Harvey Welch and provoke a breach of the peace, in violation of 720 Illinois Compiled Statutes 5/26-1(a)(1)."

Defendant is a white male. Harvey Welch is an African-American male. Defendant filed motions to dismiss, alleging the charges failed to state a crime as a matter of law and that his conduct was pure speech protected by the first amendment (U.S. Const., amend. 1). In his motions, defendant admits that the incident occurred but denies that the incident was motivated by reason of the perceived race of the victim, as required by the hate crime statute (720 ILCS 5/12-7.1 (West 1998)). Defendant argued that Welch is an attorney, and the incident stemmed from Welch's prior representation of defendant in a former case. In January 2002, the trial court heard argument on both motions and dismissed both charges. This appeal followed.

The State raises three issues on appeal: (1) the trial **[***3]** court erred in finding that only "fighting words" can constitute disorderly conduct when words alone are alleged; (2) the trial court erred in finding the words used in this case were not "fighting words" and, therefore, could not constitute the crime of disorderly conduct; and (3) the trial court erred in finding that words had to be spoken to more than one individual to cause a breach of the peace.

[*192] The offense of disorderly conduct is broadly defined. ***HN1***[⬆] "A person commits disorderly conduct when he knowingly *** does any act in such [an] unreasonable manner as to alarm or disturb another and to provoke a breach of the peace." 720 ILCS 5/26-1(a)(1) (West 2000).

HN2[⬆] Freedom of speech is a fundamental right protected from invasion by the state by the fourteenth amendment. See Chaplinsky v. New Hampshire, 315 U.S. 568, 570-71, 86 L. Ed. 1031, 1034, 62 S. Ct. 766, 768 (1942). However, "there are certain well-defined and narrowly **[**763]** **[****291]** limited classes of speech, the prevention and punishment of which have never been thought to raise any [c]onstitutional problem. These include *** the insulting or 'fighting' words ***." Chaplinsky, 315 U.S. at 571-72, 86 L. Ed. at 1035, 62 S. Ct. at 769. **[***4]** ***HN3***[⬆] "Fighting words" are personally abusive epithets which, when addressed to an ordinary citizen, as a matter of common knowledge, inflict injury or are inherently likely to provoke an immediate breach of the peace. See Chaplinsky, 315 U.S. at 572, 86 L. Ed. at 1035, 62 S. Ct. at 769; People

v. Allen, 288 Ill. App. 3d 502, 507, 680 N.E.2d 795, 799, 223 Ill. Dec. 845 (1997). HN4[↑] A statute that punishes spoken words alone, as section 26-1 of the Criminal Code of 1961 (Code) (720 ILCS 5/26-1 (West 2000)) may, cannot withstand constitutional attack unless it cannot be applied to speech protected by the first and fourteenth amendments, even if the speech punished is vulgar or offensive. Lewis v. City of New Orleans, 415 U.S. 130, 134, 39 L. Ed. 2d 214, 219, 94 S. Ct. 970, 973 (1974). Thus, section 26-1 of the Code may only be applied in this case if the words used are "fighting words." See People v. Slaton, 24 Ill. App. 3d 1062, 1063-64, 322 N.E.2d 553, 554 (1974). The trial court did not err in finding that only "fighting words" may satisfy the statute.

HN5[↑] A trial court may dismiss a charge in a criminal **[***5]** case on the grounds that the charge does not state an offense. 725 ILCS 5/114-1(a)(8) (West 2000). Dismissal of the charge on such grounds does not prevent the filing of a new charge. 725 ILCS 5/114-1(e) (West 2000). Nevertheless, HN6[↑] the State may appeal from an order dismissing a charge for any of the grounds enumerated in section 114-1 of the Code of Criminal Procedure of 1963 (Code of Criminal Procedure) (725 ILCS 5/114-1 (West 2000)). 145 Ill. 2d R. 604(a)(1). The standard of review of a defendant's motion to dismiss an indictment is whether the indictment strictly complies with the pleading requirements of section 111-3 of the Code of Criminal Procedure. People v. Oaks, 169 Ill. 2d 409, 442, 662 N.E.2d 1328, 1342, 215 Ill. Dec. 188 (1996). HN7[↑] Section 111-3(a)(3) of the Code of Criminal Procedure requires that an indictment adequately inform an accused of a charged offense by setting forth the nature and elements of the offense charged. 725 ILCS 5/111-3(a)(3) (West 2000). The question is not whether the alleged offense could have been **[*193]** described with **[***6]** greater certainty, but whether the charge is stated with sufficient particularity to enable the accused to prepare a proper defense. People v. Becker, 315 Ill. App. 3d 980, 997, 734 N.E.2d 987, 1001, 248 Ill. Dec. 696 (2000). HN8[↑] When addressing a defendant's motion to dismiss a charge for failure to state an offense, a trial court is limited to assessing the legal sufficiency of the charge and may not evaluate the evidence that the parties might present at trial. People v. Soliday, 313 Ill. App. 3d 338, 342, 729 N.E.2d 527, 530, 246 Ill. Dec. 154 (2000). We review the dismissal *de novo*. People v. Smith, 259 Ill. App. 3d 492, 495, 631 N.E.2d 738, 740, 197 Ill. Dec. 516 (1994).

HN9[↑] A charge that sets forth elements that do not amount to an offense may be dismissed under section 114-1(a)(8) of the Code of Criminal Procedure. For example, a charge that simply states that a defendant unlawfully possessed a weapon, a hacksaw blade, is properly dismissed. Hacksaw blades are not defined as weapons by any statute and are not considered weapons *per se*. A hacksaw blade may be a weapon by virtue of the way it is used, but absent allegations **[***7]** of use, no criminal offense is stated. People v. Morissette, 225 Ill. App. 3d 1044, 1047-49, 589 N.E.2d 144, 147-48, 168 Ill. Dec. 30 (1992); see also **[**764]** **[****292]** People v. Sparks, 221 Ill. App. 3d 546, 549-50, 582 N.E.2d 314, 316-17, 164 Ill. Dec. 106 (1991) (charge alleging criminal sexual assault dismissed where it did not define the "position of trust" the defendant held in relation to the victim).

A charge simply that defendant committed disorderly conduct by saying "good morning" would appear not to state an offense. The addition of the statutory language "in such an unreasonable manner as to alarm or disturb another and to provoke a breach of the peace" would not be sufficient to create an offense. HN10[↑] Where the statute does not define or describe the act or acts constituting the offense, a charge couched in the language of the statute is insufficient. Rather, the facts that constitute the crime must be specifically set forth. People v. Nash, 173 Ill. 2d 423, 429, 672 N.E.2d 1166, 1169, 220 Ill. Dec. 154 (1996); People v. Swanson, 308 Ill. App. 3d 708, 712, 721 N.E.2d 630, 633, 242 Ill. Dec. 351 (1999) (disorderly conduct). **[***8]**

After reviewing the case law, we conclude that HN11[↑] the speaker's "fighting words" must contain either an explicit or implied threat and that vulgarities and epithets do not suffice to trigger the State's prosecutorial powers and criminal sanctions. For example, in People v. Davis, 82 Ill. 2d 534, 413 N.E.2d 413, 45 Ill. Dec. 935 (1980), the supreme court reversed the appellate court's holding that the defendant's acts did not constitute disorderly conduct as a matter of law. There, the defendant entered the home of the complaining witness and approached her waving sheets of white paper. "He pointed his finger at her and said that his brother was not going to jail or to court. Then he **[*194]** said, 'If he do, Miss Pearl, you know me.'" Davis, 82 Ill. 2d at 536, 413 N.E.2d at 415. The complaining witness, Pearl Robinson, was 81 years old and, on the date in question, was ill and confined to a wheelchair. The record showed that she had previously sworn out a complaint against the defendant's brother for an unrelated incident. Although the words on the surface were ambiguous, they clearly conveyed a *threat* to the

victim. See also *In re D.W., 150 Ill. App. 3d 729, 732, 502 N.E.2d 419, 421, 104 Ill. Dec. 156 (1986)* **[***9]** ***HN12***[⬆] ("State may prove a breach of the peace by showing either that the defendant *threatened* another or that the defendant's actions had an effect on the surrounding *crowd*" (emphases added)).

By contrast, this court reversed a conviction for disorderly conduct in *People v. Bradshaw, 116 Ill. App. 3d 421, 452 N.E.2d 141, 72 Ill. Dec. 209 (1983)*, where the defendant used vulgar language toward the manager of a bar. There, this court held that "[w]hen the conduct of a patron of a private establishment is merely annoying customers and that patron refuses the demand of the proprietor to leave[,] *** the charge of criminal trespass to land is the proper charge to make." *Bradshaw, 116 Ill. App. 3d. at 422-23, 452 N.E.2d at 142*. After considering the words used, as well as to whom they were directed and the place in which they were spoken, we held defendant's *vulgarities* did not amount to disorderly conduct. See also *People v. Raby, 40 Ill. 2d 392, 397, 240 N.E.2d 595, 598 (1968)*, quoting *Cox v. Louisiana, 379 U.S. 536, 557, 13 L. Ed. 2d 471, 482, 85 S. Ct. 453, 462 (1965)* ("under no circumstances would the statute **[***10]** 'allow persons to be punished merely for peacefully expressing unpopular views'"); *City of Chicago v. Blakemore, 15 Ill. App. 3d 994, 996-97, 305 N.E.2d 687, 688-89 (1973)* (absent evidence of overt acts by defendant, offensive language addressed to police officer does not cause a breach of peace even when bystanders are present).

[765]** **[****293]** We find defendant's hail to the complaining witness in this case more like the vulgarities found in *Bradshaw* than the threats found in *Davis*. The indictment and information allege only that defendant yelled this remark to the complaining witness across a public street and nothing more. Unlike *Davis*, defendant's words contained no implied threat. The indictment and information do not set out any secret threatening or obscene meaning known only to Welch and defendant. Welch and many others may find the words offensive, but our cases have held that this alone is not enough. Confining our analysis to the charging instruments, as we must on review of a judgment dismissing for failure to state a crime, we find the comment by defendant did not rise to the level of "fighting words," because the comment did not contain an explicit or implied **[***11]** threat. Because the **[*195]** only conduct alleged to have violated the statute was the use of these words, and because the "fighting words" requirement has not been met, the information charging defendant with disorderly conduct fails to state an offense. Further, because the disorderly conduct was the underlying offense for the State's indictment of defendant for a hate crime, both charges fail to state an offense.

We agree with the State that the trial court erred when it held that "fighting words" had to be spoken to more than one individual to cause a breach of the peace. In its ruling on the motion, the trial court said "the audience has to be more than one individual." ***HN13***[⬆] While the statutory language makes reference to a breach of the peace, implying the public tranquility is what it seeks to protect, the supreme court has interpreted the intent of the disorderly conduct statute as seeking to guard against an invasion of the right of others not to be molested or harassed, either mentally or physically, without justification. *People v. Davis, 82 Ill. 2d at 538, 413 N.E.2d at 415*. Further, the supreme court has favorably cited the committee comments to *section 26-1* of the Criminal Code of 1961 **[***12]** (*720 ILCS 5/26-1* (West 1998)), which state "'no attempt has been made to limit the scope of the article to public acts.'" *Davis, 82 Ill. 2d at 538, 413 N.E.2d at 415*, quoting Ill. Ann. Stat., ch. 38, par. 26-1, committee comments, 1961, at 150 (Smith-Hurd 1977). Accordingly, this court has held "[i]t is not necessary that the act occur in public, only that defendant's actions disturb the public order." *Allen, 288 Ill. App. 3d at 506, 680 N.E.2d at 798*.

For the reasons stated, we affirm the trial court's judgment.

Affirmed.

KNECHT and APPLETON, JJ., concur.

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