SUPREME COURT OF FLORIDA

MICHAEL EARL DOBBINS,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.
_____/

CASE NO.: 80,580

DISTRICT COURT OF APPEAL,
FIFTH DISTRICT NO.: 91-1953

PETITIONER'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE

This is an appeal from a criminal conviction under Florida's recently enacted "hate crime" law, F.S. 775.085 (1989), in the Circuit Court of Volusia County, Florida, Honorable Shawn Briese presiding.

The Fourth Amended Information filed by the State on May 30, 1991, charged the Appellant in Count I with Battery in violation of F.S. 784.03(1)(a) and F.S. 775.085. (R.524) Specifically, the Appellant was charged with committing a battery by hitting or kicking the victim John Daly, and during the commission of the battery, evidencing prejudice based on Daly's ancestry, ethnicity, religion or national origin. The effect of the allegation of prejudice under F.S. 775.085 was to elevate the degree of the offense from a first degree misdemeanor to a third degree felony. In Count II, the Appellant was charged with Accessory After the Fact. (Id.)

The Appellant challenged the constitutionality of F.S. 775.085 under the First Amendment in a Motion to Dismiss (R.527) and at a hearing held thereon before the Court prior to trial. (R.5-28) At the conclusion of the trial, the Judge ruled that the Statute was constitutional and denied the Motion to Dismiss. (R.500)

The case was tried before a jury June 18 through 21, 1991. When the State rested, the Court directed a judgment of acquittal as to Count II (Accessory After the Fact). (R.285-407) At the conclusion of the trial, the jury returned a verdict of guilty as charged under Count I (Battery). (R.533)

The Appellant filed a Motion for New Trial on July 3, 1991, which was denied without hearing by the Court. (R.534,536)

The Court sentenced the Appellant on August 26, 1991, adjudicating him guilty of the felony battery and imposing 364 days incarceration in the Volusia County Jail, followed by four (4) years probation. (R.538-541)

Appellant filed his Notice of Appeal on September 4, 1991 (R.542), and on September 24, 1992, the Fifth District Court of Appeal rendered its opinion finding Florida's Hate Crime Law to be constitutional under the First Amendment and affirming the Appellant's conviction.[1]

On December 23, 1992, this Court accepted jurisdiction.

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[1]See Appendix A for a certified copy of the Fifth District's opinion.

STATEMENT OF FACTS

This incident occurred on October 7, 1990, at a party in Daytona Beach. Three (3) groups were involved: the Appellant Mike Dobbins, and certain of his acquaintances from Orlando, namely, Robert Huttner, Terry Lewis, Richard Meyers and his girlfriend, were one group at the party (R.306,308,338,417); the second group comprised the victim, John Daly, and certain of his acquaintances from Ocala, namely, Chris Doyle, John Kahlkopf and Heather Arnold (R.80,91); and the third group involved Fran Mercuri from Daytona Beach, who hosted the party (R.248,343)

All of them in varying degrees were or had been members of certain teen groups loosely known as "Skinheads", which generally are "white power" groups. (R.78-85,340) The members wear extremely short crewcut hair, military boots, suspenders, and sometimes other gear. For example, the victim Daly wore what was known as a Hitler T-shirt, i.e., a T-shirt with a picture of Adolph Hitler on the front formed by means of hundreds of tiny skulls. (R.109,120,242,261,426)

By October, 1990, Mike Dobbins was no longer much interested or very active with the Skinheads. (R.414-415) Following his graduation from high school in the Spring, he had signed up to join the Marine Corps and was waiting orders to report to camp. (Id.) By contrast, certain others, e.g., Meyers, Huttner, Mercuri, and Heather Arnold, were among the most serious members, not only being skinheads but also members of larger, nationally organized groups such as White Aryan Resistance (W.A.R.), Aryan Youth Force (A.Y.F.), The American Front, and other organizations. (R.86-87)

The victim, John Daly was not only a Skinhead in the Ocala group but was also a member of the national organization known as The American Front, and had been appointed the chapter leader for Ocala and assigned to recruit new members.

(R.85,117-121,132) His close friends, Chris Doyle and John Kahlkopf (who testified for the State) testified that Daly took his membership quite seriously. (R.232-233)

Daly also testified that he was Jewish. (R.71-73) But no one in his group in Ocala, e.g., Doyle and Kahlkopf, thought that he was Jewish. (R.89,126-127,264) In fact, they testified that Daly was not and had often made anti-Jewish statements. (R.126-127)

Dobbins had never met Daly prior to the evening of the party on October 7 and knew nothing about him (other than one telephone call many months earlier when Daly inquired how to join the Skinheads). (R.94,415,426)

On October 7, 1990, Mercuri invited Meyers and some of the others to a party at his new apartment near the beach in Daytona Beach. Meyers invited Dobbins and Lewis to go with him to the party. (R.416-417) John Daly went with his friends from Ocala. (R.91)

At the party there was a large quantity of beer. Dobbins and Daly drank only a little, but others, particularly Meyers and Huttner, drank excessive amounts of beer and became highly intoxicated. (R.236,310,346,436)

During the party, Dobbins briefly walked into a room where some of the persons were engaged in a discussion about hurting Daly. (R.346-348,422) Dobbins did not join in the talk at all and told them that it was a "stupid" idea. (R.352-422) The apparent reason for the talk was that Meyers and Huttner were angry that Daly was supposed to burn a tatoo off the neck of his friend, Heather Arnold. (R.145,147,237238,265,350,374-376,424,444) Dobbins walked out and did not participate in any discussion of the matter. (R.349,351,370,422) This was corroborated by the State's witness, Terry Lewis. (R.349-352)

Later the group decided to go to the beach to go swimming. (R.428) By that time Appellant had learned that Lewis might fight Daly one on one or that nothing

was going to happen (to Daly). (R.227,239,267,370,423,427) Fights among members and excessive drinking are not uncommon among some of the Skinheads at their parties. (R.133,367-368,418-419)

At the beach, as the group walked toward the water, Huttner suddenly turned and said to Terry Lewis, "Now," and Lewis punched Daly. The rest of the group then started to hit Daly. At this point, Dobbins also threw a punch at Daly. (R.431-432,445) Daly fell to the sand and covered his head with his arms as some in the group kicked him. Daly testified that Dobbins said "Jew boy" and kicked him. (R.102,105) Dobbins denied this during his testimony. (R.433) The State's witness, Terry Lewis, also contradicted Daly and testified that it was in fact not Dobbins but Huttner who said Jew boy (or "Die Jew die"). (R.358) And Huttner, also testifying for the State, as much as admitted this. (R.316,327) (See also, Kahlkopf testimony, R.268) Nothing else was said during the entire incident by anyone else. (R.359,434) Daly testified that he was not sure - and could not swear - that the incident was motivated because he was Jewish. (R.155-156)

After Dobbins hit Daly, he dropped out of the fight. (R.256,319,357,432) Thereafter, however, the fight suddenly became more serious than any Dobbins had seen at other parties. Huttner and Meyers (the ones most upset about Daly earlier at the party) dragged Daly into the surf and held him under water. (R.103,106,321) Dobbins tried to stop them. (R.327,435-436) He went to them and tried to pull Huttner off Daly. (Id.)

At this point, the Beach Rangers came by and the group disbursed. To the Beach Rangers, it appeared to be a group of teenagers horsing around in the water. (R.274-275) After the Rangers left, Huttner and Meyers apparently resumed their attack on Daly. However, Dobbins was not present and did not see this.

Everyone except Daly returned to Mercuri's apartment. (R.440) Daly met with the Rangers shortly thereafter when they passed by a second time, but he did not report any crimes or wrongdoing. (R.276-278,286-287) The Beach Rangers observed some bruises and a small cut on Daly's face, but nothing more serious. (Id.) They offered Daly medical attention anyway, but he refused it. (R.108,112,159-161) Daly walked to his car, drove home to Ocala and went to bed. (Id.)

SUMMARY OF ARGUMENT

POINT ONE: Florida Statute 775.085 is unconstitutionally vague and overbroad because (1) it provides no objective standards to warn the public as to what kinds of conduct, speech, thought or opinion will incur the enhanced criminal penalties provided by the statute; (2) it fails to require mens rea, i.e., the statute fails to require that the alleged prejudice be linked as motive or intent in the commission of the underlying crime or that the defendant charged personally and knowingly evidence the alleged prejudice; and (3) the statute fails to provide standards to guide police and prosecutors and lends itself to arbitrary enforcement.

The Statute is also unconstitutional because it is susceptible of application to constitutionally protected speech or beliefs.

POINT TWO: The principle issue at trial was not whether the Appellant committed a battery, but whether he did so with religious or ethnic prejudice against the victim Daly. The Information specifically alleged the Appellant "did evidence" such prejudice during the commission of the battery. (R.524)

However, the Court refused to so instruct the jury. Instead, the instruction given by the Court (over objection) permitted the Appellant to be convicted solely upon prejudice evidenced by others (or no one) without any finding that the Appellant knowingly aided and abetted this prejudice.

POINT THREE: The victim could not testify that religious prejudice was the motive for the commission of this crime. The Appellant denied such prejudice. No other witness testified that the battery was committed because of religious prejudice or that the Appellant said or did anything whatsoever to exhibit religious prejudice against the victim. Viewed in the light most favorable to the State, there is an absence of substantial, competent evidence that the Appellant evidenced religious

prejudice during the commission of the battery so as to justify imposition of the enhanced penalties of F.S. 775.085.

POINT ONE: F.S. 775.085 IS UNCONSTITUTIONAL BECAUSE IT IS VAGUE, OVERBROAD AND IMPOSES CRIMINAL PUNISHMENT UPON PROTECTED SPEECH.

Appellant submits that Section 775.085 Florida Statutes (1989) (the "Statute") is unconstitutional under the First and Fourteenth Amendments to the U.S. Constitution and also under Section 4, Article I of the Florida Constitution because it is vague, overbroad and imposes criminal punishment upon protected speech.

The Statute reads as follows:

> The penalty for any felony or misdemeanor shall be reclassified as provided in this subsection if the commission of such felony or misdemeanor evidences prejudice based on the race, color, ancestry, ethnicity, religion or national origin of the victim.
>
> * * *
>
> A misdemeanor of the first degree shall be punishable as if it were a felony of the third degree.

a. Vagueness and Overbreadth.

Any criminal statute which, due to vagueness and overbreadth, is susceptible of application to protected speech is facially unconstitutional under the First and Fourteenth Amendments. Lewis v. City of New Orleans, 425 U.S. 130, 94 S.Ct. 970, 39 L.Ed.2d (1974). An appellant is accorded standing to challenge such laws even where the specific language the appellant used might have been punishable under a properly limited ordinance. Id., 39 L.Ed.2d at 219.

Appellant submits that the Statute is inherently vague and overbroad. Section 775.085 layers on additional punishment if the commission of a crime evidences "prejudice based on race, color, ancestry, ethnicity, religion or national origin of the victim". What constitutes "prejudice" under the Statute is not defined.

No objective standards warn the public as to what kinds of conduct, speech, thought or opinion regarding a victim's race, color, ancestry, ethnicity, religion or national origin would constitute "prejudice" and thus incur enhanced criminal punishment. No objective standards guide the police, prosecutors or triers of fact.

Statutes employing similarly vague standards to impose criminal penalties upon citizens has been struck down when possibly imposing on First Amendment protections. Thus, in the Lewis case, supra, the Court reviewed an ordinance making it a crime for any person to "wantonly curse or revile or to use obscene or opprobrious language" toward a police officer in the performance of his duty. The Court held the words "opprobrious language" were unconstitutionally vague and were susceptible of application to protected speech. In Keyisham v. Board of Regents of New York, 385 U.S. 589, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967), the Supreme Court held that statutes authorizing the firing of teachers for making "seditious" or "treasonous" utterances were unconstitutionally vague, because a teacher could not know the extent to which the utterance must transcend mere statement about abstract doctrine. The Court likewise held that statutes banning state employment of any person "advocating" forceful overthrow of the government were unconstitutionally vague as possibly prohibiting advocating the doctrine in the abstract.

Similarly, even though the Statute in question does not expressly state it regulates speech, nevertheless, because it criminalizes certain kinds of "prejudice" evidenced by the commission of a crime, it necessarily raises legitimate First Amendment concerns. First, the vagueness of Section 775.085 makes it possible that punishment will be arbitrarily imposed upon speech or opinion which is not criminal and which is constitutionally protected.

Allegations of prejudice under this statute could be charged in at least three (3) ways: (a) from direct speech, e.g., calling a victim a name, or shouting a slogan (i.e., the case at hand); (b) by alleged symbolic acts, e.g., burning a flag, destroying a draft card; painting a swastika; wearing a cross or political button; having a bumper sticker on your car; and, (c) perhaps most dangerously, from totally non-expressive acts alleged to evidence prejudice, e.g., committing a battery upon a black, a Jew, a white, or an Indian; defacing private property such as a church, an embassy, or the offices of the NAACP, Polish-American Society, etc.; damaging an Italian restaurant or the automobile of a foreign national; or participation in a public demonstration against the teachings of a church or the speeches of a public figure of color or ethnic origin during which a trespass or criminal mischief charge arises. In the case at hand, it is the Appellant's alleged spoken words "Jew boy" (combined with the victim's alleged Jewishness) that forms the basis for his conviction.

Importantly, the Statute fails to require that the alleged prejudice have any specified relationship to the commission of the crime, e.g., such as motive. Any evidence of prejudice toward the victim would be sufficient to invoke the Statute's penalties even if not a motivating factor in the commission of the underlying crime.

Thus, the Statute could be applied to the following cases:

(a) A white police officer stops and guestions a black defendant walking down a city street late at night on suspicion of loitering and prowling. The defendant refuses to give his name or any other information. The officer places the defendant under arrest for loitering and prowling, but the defendant physically struggles with the officer to prevent being handcuffed. During the struggle the defendant calls the officer a "white honky pig". The prosecutor charges the defendant with resisting an officer with violence and evidencing prejudice based on

race during the commission of the crime, elevating the offense to a second degree felony. An all-white jury convicts the defendant guilty as charged, and the Judge adjudicates the defendant guilty of the enhanced felony.

(b) A poor, single fifteen year-old girl becomes pregnant by her boyfriend. She is very upset and her parents do not know of the pregnancy. She decides to go to a local family clinic for counseling. The clinic also performs abortions. A "right to life" group from a local church is staging an anti-abortion protest on the sidewalk outside the clinic. As the girl approaches, a man wearing a cross and holding a sign saying "Abortion is murder" confronts the girl and tells her she'll go to Hell if she doesn't keep her baby. The girl calls the man a "religious bigot" and pushes him out of the way. The police are called and choose to arrest the girl for battery. The prosecutor files an information charging her with battery on the man and with evidencing religious prejudice during its commission, elevating the offense to a third degree felony. A jury convicts her as charged at trial, and the Court adjudicates her of a felony.

Either of these cases reveals the overbreadth of the Statute, because each of them qualify for prosecution on the grounds that "the commission of the felony or misdemeanor...evidences prejudice based on the race,...religion...of the victim."

The analysis of the Fifth District below on this point is not persuasive, i.e., that the commission of these crimes would not evidence prejudice. (Appendix A, pp. 3-4) The lower court glosses over the plain language of the statute and seems to employ some subjective (undefined) test that such crimes simply do not evidence prejudice within the meaning of the Statute. Id. First, this approach will lead to a morass of appellate review to decide when certain crimes do or do not evidence prejudice. A battery, for example, under certain circumstances

apparently would not evidence prejudice, but in other cases, might. Second, the lower court's reasoning that "the fact that racial prejudice may be exhibited during the commission of the crime is itself insufficient" (Id.) to sustain conviction is inconsistent and illogical. Clearly, any evidence of prejudice exhibited during the commission of any crime alleged to have violated the Statute will be admissible as evidence of the commission of the alleged hate crime. In fact, in the case at hand, it is the Appellant's own alleged religious slur (Jew boy) regarding the victim (combined with his alleged Jewishness) that is prominently relied upon by the lower court in affirming his conviction.

The Fifth District's final conclusion that, in the Appellant's case, the Statute is not vague because it required the jury to find that the victim was chosen "because he was Jewish" is clearly incorrect. The Statute only requires the jury to have concluded that the battery evidenced "prejudice" against Daly (the victim) because he was Jewish. There is no requirement in the Statute that the crime have been motivated by prejudice against the victim or that the victim was selected because of such prejudice, contrary to the assertion of the Fifth District.

The Courts have long recognized that the constitutionality of a vague statutory standard is closely related to whether that standard incorporates a requirement of mens rea. Colautti v. Franklin, 439 U.S. 379, 395, 99 S.Ct. 675, 58 L.Ed.2d 596, 609 (1979). In the Colautti case, the Court held that a Statute was unconstitutionally vague where it required, upon pain of penal sanctions for its violation, a physician performing an abortion to determine if a fetus "is viable or may be viable," particularly where criminal sanctions were authorized without proof of scienter.

The Statute does not require scientor, mens rea or motive. In fact, it nowhere even requires the defendant do some act which evidences personal

possession of such prejudice on his part. Instead, prejudice exhibited by a co-defendant (or just circumstances) would be sufficient to subject other co-defendants to enhanced punishment without proof that each of them knowingly evidenced such prejudice or knew in advance that the co-defendant was so motivated and willingly aided and abetted the commission of the crime.

The Statute is also unconstitutionally vague because it provides no standards to guide police, prosecutors, juries or the courts as to what kind of conduct or speech evidences prejudice and is thus punishable. It has been held that a criminal statute may be void for vagueness not only when it fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden, but also when the statute is so indefinite that it encourages arbitrary and erratic arrests and convictions. Colautti v. Franklin, supra. In Kolender v. Lawson, 461 U.S. 352, 357-358, 103 S.Ct. 1055, 75 L.Ed.2d 903, 909-910 (1983), the Supreme Court has held that a Statute which lends itself to arbitrary enforcement can be void for vagueness even if it gives fair notice of what conduct it prohibits:

> Although the doctrine focuses both on actual notice to citizens and arbitrary enforcement, we have recognized recently that the more important aspect of vagueness doctrine "is not actual notice, but the other principal element of the doctrine - the requirement that a legislature establish minimal guidelines to govern law enforcement." Smith, supra, 415 U.S. at 574, 94 S.Ct., at 1257-1248. Where the legislature fails to provide such minimal guidelines, a criminal statute may permit "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections."

In Kolender, the Supreme Court found unconstitutionally vague a California Statute that failed to make clear what would constitute "creditable and

reliable" identification of persons stopped for loitering on the streets by a police officer with articulable suspicion.

Similarly, in City of Pompano Beach v. Capalbo, 455 So.2d 468 (Fla. 4th DCA 1984), the Court found an ordinance which proscribed sleeping in an automobile parked in a public place void for vagueness because it permitted arbitrary enforcement by the police, even though the ordinance gave ample notice of the conduct it proscribed. The Court also found the ordinance was unconstitutionally overbroad:

> A penal statute that brings within its sweep conduct that cannot conceivably be criminal in purpose or effect cannot stand. Id., at 471.
>
> The danger of selective and prejudicial enforcement of the law by police, prosecutors, and juries, based on subjective factors difficult to review upon appeal, is too great under this law to be permitted under our constitution.

The vagueness of the Statute in this case, its susceptibility of application to a wide variety of situations and conduct, and the lack of explicit standards to guide the police and courts, subjects the citizens to arbitrary and erratic arrest and conviction and renders the Statute unconstitutionally vague.

b. Punishment of Opinion.

Because the Statute criminalizes "prejudice" evidenced during the commission of a crime, it necessarily renders it susceptible of application to protected speech or beliefs, in violation of the First Amendment. The underlying crime is punishable as provided by the particular statute as the case may be, e.g., a battery is a criminal offense punishable as a misdemeanor by F.S. 794.03. The enhanced punishment required by Section 775.085 is imposed solely for certain "prejudice" evidenced by commission of the crime. As previously noted, the

offending "prejudice" is not required by the Statute to be a motive of the crime, nor is proof required that the crime was specifically intended to harm a victim for racial, religious, or other specified reasons.

Thus, the punishment authorized by F.S. 775.085 may be imposed solely for the display, possession or expression of opinions which are denominated as prejudice by police and prosecutors. Prejudice, like beauty, is in the eye of the beholder. It is a derogatory term for "opinion". Opinions may be favorable or unfavorable, popular or unpopular. The opinions of one man may be viewed as prejudice by another man.

The constitutional guarantee of free speech heretofore has not permitted a state to punish the mere expression of opinion unless such speech is intended to incite or produce imminent lawless action and such is likely to occur under the circumstances. Brandenburg v. Ohio, 395 U.S. 444, 89 So.Ct. 1827 (23 L.Ed.2d 430 (1969). In Brandenburg, the leader of the Ku Klux Klan spoke at a Klan rally, burned a cross, and made such statements as "bury the niggers", "niggers should be returned to Africa", and "send the Jews back to Israel". He was arrested and convicted under a criminal syndicalism statute which made it a crime to advocate crime, sabotage, violence or unlawful methods of terrorism as a means of accomplishing industrial or political reform. The Supreme Court held the statute was unconstitutional for its authorization of criminal penalties for "mere advocacy not distinguished from incitement to imminent lawless action". 395 U.S. at 449, 23 L.Ed.2d at 434. The Court wrote as follows:

> A statute which fails to draw this distinction impermissibly intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments. It sweeps within its condemnation speech which our Constitution has immunized from governmental control. (numerous cites omitted.) Id.

Section 775.085 similarly sweeps within its condemnation speech which does not necessarily incite or motivate lawless action and which is thus constitutionally protected.

But even if the Statute were to be construed to apply only to constitutionally proscribable speech (e.g., "fighting words"), the Statute nevertheless impermissibly engages in content-based regulation in violation of the First Amendment. RAV v. City of St. Paul, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992). In RAV, the Court stated the key constitutional premise as follows:

> We have long held...that nonverbal expressive activity can be banned because of the action it entails, but not because of the ideas it expresses. 112 S.Ct. at 2544.

In RAV, the Court reviewed a St. Paul Ordinance making it a crime to place a symbol on public or private property, knowing or having reasonable grounds to know such would arouse anger or resentment in others on the basis of race, color, creed, religion or gender. Even though the Minnesota Supreme Court construed the law narrowly to apply only to "fighting words" that insult or provoke violence on the basis of race, religion, etc. (which was accepted by the Court on appeal), the U.S. Supreme Court struck down the law precisely because it was directed to the content of the ideas expressed:

> What we have here, it must be emphasized, is not a prohibition of fighting words that are directed at certain persons or groups (which would be facially valid if it met the requirements of the Equal Protection Clause); but rather, a prohibition of fighting words that contain (as the Minnesota Supreme Court repeatedly emphasized) message of "bias-motivated" hatred and in particular, as applied to this case, messages "based on virulent notions of racial supremacy". Id. at 2548.

Similarly in the case at hand, the Statute is not directed at the protection of specific persons or groups, i.e., Blacks, Jews, etc. Rather, it is a prohibition of the expression of a certain disfavored "prejudice" based on race, religion, etc. Thus, the Statute does not punish the conduct of selecting a Black or a Jew as a victim, as the Fifth District argues (and no argument is made as to the constitutionality of this). (Appendix A, p. 4). It punishes only evidence of "prejudice" based on race or religion. Thus, a Black who beats a Black, or a Jew who beats a Jew, would not be prosecuted -- unless there was evidence of racial or religious prejudice by the defendant toward the victim. Accordingly, it is not the group that is protected (as argued by the lower court) -- rather the Legislature has imposed punishment directly upon disfavored opinions or beliefs. The Fifth District is incorrect when it writes that "it does not matter why a woman is treated differently than a man, a black differently than a white, a Catholic differently than a Jew; it only matters that they are". (Appendix A, p. 6). On the contrary, it is precisely the content of the underlying reason for the different treatment that triggers the Statute.

In the final analysis, it does not matter if the Statute is viewed as punishing the conduct of selecting a certain kind of victim, because the reason for the punishment is nevertheless based upon the content of the underlying reason or motive of the defendant, i.e., whether it evidences prejudice based on race, religion, etc. This is exactly the kind of content-based regulation condemned in RAV as a violation of the First Amendment.

Further, the Statute actually goes even beyond mere content discrimination to actual viewpoint discrimination. For example, the law would punish a defendant who beats Jews because he hates Jews. But the law would not punish a defendant who intentionally beats Jews because, for example, he thinks they are

superior opponents to Gentiles (or that Gentiles are unworthy to touch). This kind of viewpoint discrimination was also condemned in RAV.

If this law is allowed to stand, reverse legislation will be authorized. Thus, a subsequent "extreme right" legislature could enact a new statute reducing the punishment for the crime of battery where its commission evidences a good faith belief by the defendant that the victim was (for example) a person of African descent, Jewish ancestry, Baptist faith, etc. Under the reasoning of the Fifth District, the law would stand because the Legislature was acting within its power to determine appropriate punishment for a criminal act, i.e., the conduct of selecting the victim.

The Fifth District's analogy that the Statute does not differ from certain Federal anti-discrimination statutes (e.g., 42 U.S.C. §2000e.2) is inapposite. First, unlike the Statute at hand, the referenced federal statutes do not operate upon the express finding of "prejudice", but rather upon a finding of a refusal to hire, promote, rent, sell, etc., because of the race, religion, sex, etc., of the complainant. Secondly, the thrust of the federal statutes is to restore or confer to the complainant certain legal rights, benefits, or privileges wrongfully denied, but not (unlike the Statute in question) the imposition of a penalty upon the defendant (speaker or actor) for the possession of prejudice. The same is also true of the juror exclusion cases cited by the Fifth District, e.g., State v. Neil, 457 So.2d 481 (Fla. 1984).

The further argument by the Fifth District that the Statute's constitutional validity is established because motive may properly be used to enhance the sentence for a crime [e.g., Barclay v. Florida, 463 U.S. 939, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983)], does not withstand analysis. First, sentencing courts traditionally have been permitted to evaluate motive in imposing criminal punishment,

but in so doing, the courts have been applying statutory penalties within a preset range defined generally for the criminal act in question. The penalties have not been set by the Legislature in such cases specifically for the purpose of punishing motive (i.e., unpopular opinions, beliefs, or prejudices) as in the case at hand. In practice, however, there may well be times when the sentencing procedure in a particular case could violate the First Amendment (which simply raises a separate issue not argued here). But such sentencing practices do not expressly and routinely implicate First Amendment protections as in the case at hand. (Nor should an occasional violation of the First Amendment be extended to justify this Statute.) Second, as pointed out in RAV, even though a particular type of speech may be unlawful and thus proscribable under the First Amendment (e.g., "fighting words", obscenity), government still may not choose to regulate such speech on the basis of its content, i.e., hostility (or favoritism) towards the underlying message expressed. The Statute before the Court does just that - it penalizes "prejudice" of a certain kind (i.e., negative and derogatory opinions based on race, religion, etc.) based on hostility toward those opinions, i.e., "prejudice". Thus, while the government may criminalize the crime of battery, in the vernacular of RAV, the government may not choose to criminalize only those batteries that evidence disagreement with the Governor's religious faith.

It is clear that the greater evil to the people lies in sustaining this Statute and thereby power of the Government to select which motives (i.e., ideas, beliefs, "discriminations") deserve punishment (whether enhanced or not). Far from reducing the evil of prejudice in the State (assuming that such would be possible anyway), we will be loosing the rapacious lions of prejudice to divide and devour us by Legislative enactment and jury verdict, as each group vies to criminalize and penalize its pet prejudices. The unpopular ideological minority of the

moment will be prosecuted by the majority. Politically correct thinking may be imposed on pain of penal sanctions. We could well become a nation of warring religious or racial factions, as we witness daily around the world in such places as Lebanon, India, etc. These are the very evils the First Amendment was designed to avoid.

Most Americans rightly view Naziism, racism, etc., as evils and naturally feel great disgust at crimes motivated by such views. But the disgust must be directed at the criminal acts committed by the defendant and not at the unpopular opinions he may hold. The criminal statutes in existence as could apply to cases like that at hand, (assault, battery, aggravated assault, aggravated battery, attempted murder, murder, manslaughter, conspiracy and racketeering) seem more than adequate to address the degree of criminal culpability and the amount of harm inflicted by such crimes. It is not necessary, and we abandon and forfeit the First Amendment, by trying to use these crimes to vent our spleens against the underlying philosophies of hate or discrimination (on the grounds that we are only punishing the conduct of "selecting the victim"). In so doing we become intolerant of opinion, instead of crime, and we will ultimately loose the freedoms we seek so clearly to save.

POINT TWO: THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY THAT IT MUST FIND BEYOND A REASONABLE DOUBT THAT THE APPELLANT EVIDENCED PREJUDICE AGAINST THE VICTIM DURING THE COMMISSION OF THE BATTERY BEFORE RETURNING A VERDICT CONVICTING HIM UNDER F.S. 775.085 OF A HATE CRIME.

The primary issue at the trial was not whether Dobbins committed a battery, but whether he did so with religious or ethnic prejudice against Daly. The trial court, however, refused to instruct the jury it must find beyond a reasonable doubt

the Appellant did evidence such prejudice before it could convict him of a hate crime under F.S. 775.085.

Instead, the instruction given by the Court (over objection) omitted any reference to the Appellant's intent as follows:

> If you find the defendant guilty of battery you must determine beyond a reasonable doubt by your verdict whether the commission of the battery evidenced prejudice based upon the ancestry, ethnicity or religion of John Daly. (R.482,490)

The Appellant objected on the grounds that the above instruction failed to require the jury to find that the Appellant personally exhibited the required prejudice during the commission of the battery. (R.482,486,497) The Appellant argued that the instruction would permit the Appellant to be convicted based upon prejudice evidenced by someone else in the group, without proof that the Appellant knowingly intended to aid and abet such person to commit a hate crime under F.S. 775.085. Id.

The instruction given by the Court as to aiding and abetting (Standard Instruction 3.01 reference Principals), was also objected to by the Appellant. (R.483,486,490,497) This instruction only compounded the error committed above, by indicating to the jury that it did not have to conclude that Dobbins was prejudiced. Instead, the clear implication to the jury was that prejudice by anyone in the group could be used without any relation to Dobbins - to convict him of the hate crime element under F.S. 775.085.

Further, the Court's general instruction reference prejudice conflicted with the specific allegation in the Information (Count I) that Dobbins evidenced such prejudice against Daly:

> In that Michael Dobbins...did actually and intentionally touch or strike JBD...and did, in the commission of said offense, evidence prejudice based on JBD's ancestry, ethnicity, religion or national origin. (R.524) (Emphasis added.)

There are no standard jury instructions for F.S. 775.085, and the Appellant has found no appellate cases reviewing same or construing this Statute. It has always been the duty of the trial court to fully instruct the jury regarding the entire law of a case respecting all facts proved or claimed to be proved and supported by competent evidence. Polk v. State, 179 So.2d 236 (Fla. 2nd DCA 1965).

One of the main defenses in the trial below was that the Appellant was not prejudiced against the victim and did nothing to evidence such during the incident. This is clearly shown in the record. First, the prosecutor told the jury in his opening statement that a main issue in the battery charge was whether the Appellant evidenced prejudice against Daly because of race, religion, etc. (R.54,lines 14-23) Likewise, the Appellant's opening statement told the jury that the Appellant was not motivated by any prejudice against the victim and did not intend to aid and abet anyone else who was so prejudiced. (R.63,line 11; 64,line 8; 65,line 11; 66,line 5)

Thirdly, the evidence at trial raised great doubt as to whether the Appellant acted with prejudice toward the victim. The Appellant testified that he was not prejudiced (R.432,444); that he had not met Daly before and did not know he was Jewish (R.426); that the Appellant had no knowledge of any plan to harm Daly by the time the group left for the beach (R.427-428); that fights among the members of this group were common at such parties (without being motivated by any prejudice) (R.418-419,445); and that any anger at Daly by some of the others was over a girl. (R.423-424) The Appellant told the group that it was a "stupid" idea to hurt Daly and did not participate even in further discussions of it, much less any planning of it at the party. (R.422) This was corroborated by other witnesses. (R.349-352)

Appellant denied saying anything reference the victim being a Jew on the beach. (R.433-434) Robert Huttner corroborated this in his testimony and admitted to making this one statement. (R.358) No one else said anything reference Daly being Jewish on the beach. Finally, even the victim Daly testified that he was not sure if the incident was motivated by prejudice because he was Jewish. (R.155)

Thus, the charging documents, the issues raised at trial, and the evidence presented all focused on whether the Appellant, in committing a battery, did so with prejudice against the victim because of religion, ethnicity, etc. The Appellant timely objected (prior to the giving of the instructions) to the failure to instruct the jury that it must find the Appellant personally evidenced prejudice against the victim.

The trial court's instruction could easily have cured this objection by simply adding three (3) words, to-wit: "the defendant during", to the jury charge, so that the jury would have been instructed: "If you find the defendant guilty of battery you must determine beyond a reasonable doubt by your verdict whether [the defendant during] the commission of the battery evidenced prejudice based upon the ancestry, ethnicity, or religion of John Daly." Failure to give a requested jury instruction prior to the jury retiring on the law applicable to the theory of the defense constitutes error where there is evidence to support the instruction. McCray v. State, 480 So.2d 217 (Fla. 3rd DCA 1985).

It is clear that F.S. 775.085 is not limited to only specified crimes the commission of which would necessarily evidence prejudice. Rather, the Statute increases the penalty for any felony or misdemeanor if certain prejudice is evidenced during the commission. It is a denial of due process of law for F.S. 775.085 to be applied so as to allow the enhanced punishment without requiring the jury to find beyond a reasonable doubt that the defendant knowingly committed (in addition to the underlying crime) some further act evidencing the required prejudice, either

directly or by knowingly assisting someone else so prejudiced to commit a crime. See, State v. Smith, 151 So.2d 889 (Fla. 1968).

If our society is now going to impose punishment for words spoken during the commission of crimes, as in this case, it is especially important that a defendant be accorded the right to have a jury decide if he personally spoke or ratified "prejudice". This is important because the expression of opinion, i.e., prejudice, is not malum in se in our society, but is ordinarily protected by the First Amendment.

> The power of lawmakers to exclude mens rea is limited by the requirement of due process and equal protection of the laws and such power has been held not to exist in cases where the conduct is wholly passive or impinges on a constitutional guarantee. (footnote omitted). Id., at 890.

See, also, Cohen v. State, 125 So.2d 560 (Fla. 1961) (scienter held to be implied element in statute making sale of obscene literature a felony).

Thus, the trial court committed prejudicial and reversible error in failing to instruct the jury that the Appellant must be found beyond a reasonable doubt to have evidenced the alleged prejudice in the commission of the battery, or to have knowingly aided and abetted another so prejudiced to commit the battery.

POINT THREE: THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH BEYOND A REASONABLE DOUBT THAT THE APPELLANT WAS PREJUDICED AGAINST VICTIM OR AIDED AND ABETTED A CRIME WHICH EVIDENCED SUCH PREJUDICE.

The Appellant submits that the evidence was legally insufficient to establish that he committed a battery which evidenced prejudice based on the ancestry, ethnicity or religion of the victim, as charged, or knowingly aided and abetted the commission of said battery by someone else so motivated.

The Appellant here does not challenge the sufficiency of the evidence that he committed a simple battery upon the victim. What the Appellant challenges is the

sufficiency of the proof that he evidenced the alleged prejudice against the victim by or during the commission of the battery. Included in this challenge is the necessity for a determination by the Court as to what type and quantity of evidence of prejudice is legally required before F.S. 775.085 may be applied.

The standard of review for sufficiency of evidence is whether the jury verdict is supported by substantial competent evidence. 15 Fla.Jur.2d, Criminal Law, Sec. 981 (and numerous cases cited therein). After all conflicts in the evidence and all reasonable inferences have been resolved in favor of the verdict, there must be substantial evidence that reasonable minds might accept as adequate support for the conclusion reached. Id.; see also, Bradford v. State, 460 So.2d 926 (Fla. 1984). "Evidence may be regarded as insufficient where it is so weak or unconvincing as to appear false and uncertain, or where it lacks probative force, or leaves to conjecture that which must be proven beyond reasonable doubt." 15 Fla.Jur.2d, at 706 (numerous cites omitted).

Turning to the evidence, no witness testified that the motive for the alleged battery was prejudice against the victim because he was Jewish. Even the victim could not testify this was the motive, only a "possibility". (R.153-155) The Appellant testified he was not prejudiced against the victim. (R.426,432,444) No other witness testified to anything that would establish that the Appellant committed the battery due to prejudice that Daly was Jewish, or that the Appellant knowingly planned, aided or abetted someone else to commit the alleged battery because of religious prejudice.

Further, the act of the battery itself does not provide any inherent evidence of such prejudice. The Appellant had never met the victim before and did not know he was Jewish. (R.415,426) Fights are simply common occurrences at these parties. (R.418-419)

At trial, the State relied upon two (2) points to establish prejudice: first, that there was some prior discussion that indicated Daly was Jewish, and secondly, during the battery the Appellant said "Jew boy".

As to the first point, the evidence is clear and uncontradicted that the Appellant rejected any plan to harm Daly, that he told the group it was a "stupid" idea, and walked away from any further discussion of it. The Appellant testified to this (R.422) and so did Terry Lewis who was present during the discussion. (R.349) No witness has contradicted this or otherwise testified that the Appellant planned this battery with the others or that he made any statements about Daly's Jewishness at the party. (e.g., R.240).

The evidence never established that Daly's alleged Jewishness was in fact a motive for anyone in the group or even discussed at the party. The victim did not testify to such. Neither did Chris Doyle (R.225), nor John Kahlkopf. (R.251-252,265) Huttner vaguely recalled someone mentioned Daly was Jewish (R.313), most probably by Heather Arnold to himself and Meyer after they left the party. (R.314) But the Appellant was not present. (R.327,329,330) Only Terry Lewis recalled some discussion at the party that Daly was Jewish, but the Appellant had already left and was not present. (R.351) The clearest evidence is that any motivation to fight Daly by the others at the party was related to Daly's "mission" to harm the girl Heather Arnold. (Kahlkopf, R.201; Doyle, R.238,265; Lewis, R.374-376). Not even this non-prejudicial motive was attributed to the Appellant.

The second point relied upon by the State to prove prejudice is that during the initial scuffle on the beach, someone yelled "Jew boy" (or "Die Jew die", one or the other) one time. The victim identified Appellant as saying this. (R.105) Appellant denied it, testifying Huttner said it. (R.433-434,444,477) All of the State's witnesses contradicted the victim on this point: Lewis testified that it was

Huttner who said this and not Appellant (R.358); Huttner also admitted he probably said it during his testimony. (R.316,327-328) When the statement was made, the victim (a) was lying on the sand covering his head with his arms for protection from kicks, (b) was surrounded by five or six men (R.149,151), (c) had lost his glasses and everything appeared "fuzzy" (R.101,148,151), (d) had never met Huttner, Lewis nor the Appellant before that night (R.150,152), (e) admitted that it was dark (3:30 A.M.) (R.148), (f) had consumed three (3) beers previously at the party (R.149), and, (g) admitted that he was mistaken when he previously testified the Appellant was one of the two who dragged him out into the water. (R.156) The victim's identification of the Appellant as the speaker of "Jew boy" is laden with substantial uncertainty. The State's witness Doyle who also had never met Appellant, Huttner or Lewis prior to that night, admitted he also had subsequently confused Appellant with Huttner and was uncertain as to the accuracy of his previous testimony regarding the Appellant's acts. (R.229-230,242-243)

Finally, even assuming the Appellant said "Jew boy" one time, it lacks probative force as substantial competent evidence to legally establish beyond every reasonable doubt that the battery was committed by the Appellant because of religious prejudice within the meaning of F.S. 775.085.

The totality of the evidence is that "skinheads" (of which the victim was also one) commonly got into fights at their parties. (R.419-419) Evidence of any religious prejudice by the others in this incident toward Daly is at best slight. But evidence of religious prejudice by the Appellant toward Daly is non-existent in this record other than his attributed statement of Jew boy. To hang Appellant's conviction on that statement alone is to rest it totally on evidence that is argumentative, conjectural, uncertain, and insubstantial.

The Appellant submits that the verdict, to the extent it concludes that the battery committed by the Appellant evidenced prejudice against the victim because of religion, ancestry or ethnicity within the meaning of F.S. 775.085, is not supported by substantial competent evidence and should be reversed. The evidence of prejudice required by this Statute should be held to something higher and more certain than shown against the Appellant in this case. Name-calling by a defendant during the course of a battery without any further substantial evidence of prejudice being shown should not be legally sufficient evidence so as to justify imposition of the enhanced penalties for prejudice under this Statute.

CONCLUSION

If the Court concurs with Point One that F.S. 775.085 is unconstitutional, or with Point Three that the evidence of prejudice was insufficient, the Court should reverse the conviction and remand with instructions to re-sentence Appellant for the offense of simple battery.

If the Court only concurs with Point Two that the jury instruction was error, the Court should reverse the conviction and remand for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished, by mail, to Assistant Attorney General Judy Taylor-Rush, 210 South Palmetto Avenue, Daytona Beach, Florida 32114, this 19th day of January, 1993.

Jeffrey L. Dees

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IN THE SUPREME COURT OF THE STATE OF FLORIDA

APPEAL NO. 80,580
(DCA CASE NO. 91-1953)

MICHAEL EARL DOBBINS

Petitioner

v.

STATE OF FLORIDA

Respondent

APPEAL FROM THE FIFTH DISTRICT
COURT OF APPEAL

APPENDIX TO PETITIONER'S INITIAL BRIEF ON THE MERITS

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IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT JULY TERM 1992

NOT FINAL UNTIL THE TIME EXPIRES TO FILE REHEARING MOTION, AND, IF FILED, DISPOSED OF.

MICHAEL EARL DOBBINS,

Appellant,

v.

CASE NO. 91-1953

STATE OF FLORIDA,

CORRECTED COPY

Appellee.

Opinion filed September 24, 1992

Appeal from the Circuit Court
for Volusia County,
Shawn L. Briese, Judge.

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Ormond Beach, for Appellant.

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Michael Neimand, Miami, and Richard Doran,
Tallahassee for Appellee.

Kenneth W. Shapiro of Berger & Shapiro, P.A.,
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League of B'Nai B'rith.

HARRIS, J.

John Daly, a Jewish youth, in protest to his parents and denial of his religion, joined the "Skinheads", an association openly and vociferously anti-Semitic. Ultimately, when his fellow members learned of his Jewish background, some of them decided to take action.

He was beaten by several members of the association, including Michael Earl Dobbins, appellant herein. During the beating, Dobbins and others made such statements as "Jew boy," and "Die Jew boy."

Dobbins was tried and convicted under the battery statute (Fla. Stat. 784.03(1)(a)) and sentenced under the enhancement provisions of the hate crime statute (Fla. Stat. 775.085).

We find the evidence sufficient to uphold the jury's verdict that Dobbins committed the proscribed act and that the commission of the act evidenced prejudice based on Daly's "ancestry, ethnicity, religion or national origin".

The sole issue that we find merits discussion is the constitutionality of section 775.085, Florida Statutes (1989). We find it to be constitutional.

VAGUE AND OVERBROAD

Appellant first contends that the statute is vague and overbroad. He contends the statute is susceptible of applying to protected speech because it does not require that the prejudice alleged have any specific relationship to the commission of the crime.

This argument seems to concede that if the statute permits enhancement only upon proof, beyond a reasonable doubt, that appellant committed the battery motivated, in whole or in part, because Daly was Jewish, the enhanced penalty would be appropriate.

That is precisely the way we read the statute. Section 775.085 provides:

> The penalty for any felony or misdemeanor shall be reclassified as provided in this subsection if the commission of such felony or misdemeanor evidences prejudice based on the race, color, ancestry, ethnicity, religion or national origin of the victim.

Appellant urges that the language can be read to apply to a situation in which the defendant commits a race, color or religious neutral crime (for

example, resisting arrest because he thinks he's innocent), but during the commission of the offense makes a racial slur. We do not agree. The statute requires that it is the commission of the crime that must evidence the prejudice; the fact that racial prejudice may be exhibited during the commission of the crime is itself insufficient.

In the present case the jury was required to find that the beating, based on the background and relationship between the participants and the statements made during the beating, evidenced that Daly was the chosen victim because he was Jewish. Had the fight occurred for some other reason (over a woman, because of an unpaid debt, etc.), the mere fact that Daly might have been called a "Jew boy" could not enhance the offense.

PUNISHMENT OF OPINION

The more troubling argument made by Dobbins is that the enhancement provision punishes opinion. We find the statute involved in this case sufficiently different from the St. Paul ordinance so that *R.A.V. v. City of St. Paul*, ____ U.S. ____, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992), is not dispositive.[1]

First, *R.A.V.* dealt with an ordinance that expressly made criminal the placing "on public or private property a symbol . . . which one knows . . . arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender . . ." This clearly makes criminal the public expression of an intolerant opinion. We agree that the First Amendment

[1] We notice also that in R.A.V. the defendant did not appeal, and the Supreme Court did not consider, his conviction of a racially motivated assault. It is this issue, in essence, that is before us.

prohibits intrusion into the rights of one to freely hold and express unpopular, even intolerant, opinions.

But section 775.085 does not punish intolerant opinions. Nor does it punish the oral or written expression of those opinions. It is only when one acts on such opinion to the injury of another that the statute permits enhancement.

John Stuart Mill in his *On Liberty*[2] points out this distinction:

> Such being the reasons which make it imperative that human beings should be free to form opinions, and to express their opinions without reserve; and such the baneful consequences to the intellectual, and through that to the moral nature of man, unless this liberty is either conceded, or asserted in spite of prohibition; let us next examine whether the same reasons do not require that men should be free to act upon their opinions -- to carry these out in their lives, without hinderance, either physical or moral, from their fellow men, so long as it is at their own risk and peril.
>
> This last provision is of course indispensable. No one pretends that actions should be as free as opinions. On the contrary, even opinions lose their immunity when the circumstances in which they are expressed are such as to constitute their expression a positive instigation to some mischievous act. An opinion that corn dealers are starvers of the poor . . . ought to be unmolested when simply circulated through the press, but may justly incur punishment when delivered orally to an excited mob assembled before the house of a corn-dealer . . . Acts, of whatever kind, which, without justifiable cause, do harm to others, may be, and in the more important cases absolutely require to be, controlled by the unfavorable sentiments, and, when needful, by the active interference of mankind.

We believe that the act of choosing a victim for a crime because of his race or religion is a type of speech that is subject to regulation.

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[2] John Stuart Mill, On Liberty 119 (Penguin Books Ltd., 1974) (1st ed. 1859)

We recognize that other courts have reached a different result under similar facts and similar law.

The Court in *State v. Mitchell,* 485 N.W. 2d 807, 812 (Wis. 1992) stated:[3]

> Without doubt the hate crime statute punishes bigoted thought. The state asserts that the statute punishes only the "conduct" of intentional selection of a victim. We disagree. Selection of a victim is an element of the underlying offense, part of the defendant's "intent" in committing the crime. In any assault upon an individual there is a selection of the victim. The statute punishes the "because of" aspect of defendant's selection, the *reason* the defendant selected the victim, the *motive* behind the selection.

We concede, as we must, that the defendant's motive is implicated in this issue. But that does not mean that the prohibited conduct is not subject to regulation.[4] As the Supreme Court stated in *R.A.V.*:

> From 1791 to the present, however, our society, like other free but civilized societies, has permitted restrictions upon the content of speech in a few limited areas, which are "of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."
>
> * * *
>
> We have long held, for example, that nonverbal expressive activity can be banned because of the action it entails, but not because of the ideas it expresses.

R.A.V., 112 S.Ct. at 2542-4.

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[3] *See also* State v. Wyant, 64 Ohio St.3d 566, 597 N.E.2d 450 (Ohio 1992).

[4] For example, the Supreme Court in Barclay v. Florida, 463 U.S. 939, 103 S.Ct 3418, 77 L.Ed.2d 1134 (1983), held that a sentencing judge in a capital case might properly take into consideration "the elements of racial hatred" in Barclay's crime as well as "Barclay's desire to start a race war." If a court may properly consider such racial hatred in determining whether to impose a harsher sentence, may not the legislature mandate that the judge do so? Is it proper for the court but not the legislature?

The purpose of section 775.085 is to discourage through greater penalties the discrimination against someone (by making such person the victim of a crime) because of race, color, or religion. How does this differ from any discrimination prohibition? The refusal to hire a woman cannot be justified under 42 U.S.C. section 2000e-2, 29 C.F.R. section 1604.11 (1991) because it is the expression of the employer's opinion that women should not be in the work place. The rejection of Blacks from a jury is not exempted from the consequences of *Powers v. Ohio*[5] and *State v. Neil*[6] because it is an expression of the attorney's or client's opinion that Blacks are incompetent.

In such cases it is not the content of the speech that is prohibited, but such act of discrimination. It does not matter why a woman is treated differently than a man, a black differently than a white, a Catholic differently than a Jew; it matters only that they are.

So also with section 775.085. It doesn't matter that Dobbins hated Jewish people or why he hated them; it only mattered that he discriminated against Daly by beating him because he was Jewish. This, we think, meets the Supreme Court test in *R.A.V.*:

> Thus, for example, sexually derogatory "fighting words," among other words, may produce a violation of Title VII's general prohibition against sexual discrimination in employment practices [citation omitted]. Where the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy.

R.A.V. at 2546-7.

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[5] ____ U.S. ____, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991).

[6] 457 So.2d 481 (Fla. 1984).

The Supreme Court in *R.A.V.* made it clear that they were not addressing victim specific discrimination when it said:

> What we have here, it must be emphasized, is not a prohibition of fighting words that are directed at certain persons or groups (which would be *facially* valid if it met the requirements of the Equal Protection Clause) . . .

Id. at 2548.

In our case there is no equal protection challenge to section 775.085 which does prohibit "fighting words" directed at certain groups.

There is yet another reason we find the statute constitutional. Even if the statute is considered to regulate the content of speech, it is nonetheless justified because it is narrowly tailored to serve the compelling state interest of ensuring the basic human rights (not to be a target of a criminal act) of members of groups that have historically been subjected to discrimination because of membership in those groups.

The Supreme Court in *R.A.V.* recognized this as a proper reason for regulating content and stated:

> The dispositive question in this case, therefore, is whether content discrimination is reasonably necessary to achieve St. Paul's compelling interest.

Id. at 2550.

In *R.A.V.*, the Supreme Court held that it was not. But again in *R.A.V.* the Court was dealing with an ordinance that regulated specific speech content that St. Paul considered to violate the rights "of such group members to live in peace where they wish." The Court held that the same beneficial effect sought by St. Paul could have been obtained with a less intrusive ordinance that did not target the specific content prohibited by the ordinance. For example, the ordinance could provide that it was a violation to molest Jewish

people because of their religion. This would not regulate the content of speech but rather the act of religious molestation. In our case, it is the act of discrimination against people because of their race, color or religion by making them victims of crime that is prohibited and punished, not the specific opinion that leads to that discrimination. We think that appropriate.

AFFIRMED.

GOSHORN, C.J., and DAUKSCH, J., concur.