TIME REQUESTED FOR ORAL ARGUMENT: *10 MINUTES*

TO BE ARGUED BY:
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COUNTY COURT
COUNTY OF ONONDAGA
STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

vs.

MARTHA HENNESSEY, CLARE GRADY, MARK SCIBILIA-CARVER, JUDITH BELLO, DANIEL BURGEVIN, MARY ANNE GRADY FLORES, MARK COLVILLE, BRIAN HYNES, ELLIOT ADAMS, PATRICIA WIELAND, EDWARD KINANE, JAMES RICKS,

Defendants-Appellants.

THE PEOPLE'S BRIEF

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COUNTY COURT
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THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

vs.

MARTHA HENNESSEY, CLARE GRADY, MARK SCIBILIA-CARVER, JUDITH BELLO, DANIEL BURGEVIN, MARY ANNE GRADY FLORES, MARK COLVILLE, BRIAN HYNES, ELLIOT ADAMS, PATRICIA WIELAND, EDWARD KINANE, JAMES RICKS,

Defendants.

DR No. 12-487507

Index Nos. 2014-0236–2014-0246

THE PEOPLE'S BRIEF

QUESTIONS PRESENTED

1. DID THE PEOPLE PRESENT LEGALLY SUFFICIENT EVIDENCE OF DISORDERLY CONDUCT AND WAS THE VERDICT SUPPORTED BY THE WEIGHT OF THE EVIDENCE?

   The trial court, sitting as the fact-finder, found the defendants guilty of disorderly conduct.

2. DID THE COURT PROPERLY ISSUE THE ORDERS OF PROTECTION?

   The trial court issued temporary Orders of Protection while the charges were pending and two-year Orders of Protection at sentencing.

3. DID THE ACCUSATORY INSTRUMENT CONTAIN DUPLICITOUS CHARGES?

   The trial court did not address this issue.

PRELIMINARY STATEMENT

This is an appeal from judgments of conviction for the violation of disorderly conduct (Penal Law § 240.20 [4]) following a bench trial in DeWitt Town Court (Gideon, J.) in January 2014. On February 7, 2014, the Honorable David S. Gideon announce the verdict of guilty on the charge of disorderly conduct and sentenced Martha Hennessy, Claire Grady, Mark Scibilia-Carver, Judith Bello, Rae Kramer, Daniel Burgevin, Mary Anne Grady Flores, Mark Colville, Brian Hynes, Patricia Wieland, Edward Kinane, and James Ricks to a definite term of 15 days in jail. One defendant, Elliot Adams, was unable to be in court on February 7, 2014. The court found Adams guilty of disorderly conduct and sentenced him to 15 days in jail on February 25, 2014.

The People received Notices of Appeal on February 20, 2014 and March 3, 2014. The People received a copy of a joint brief and Record on Appeal (R.) on June 29, 2015, listing the names of 12 defendants. An additional defendant whose name is not listed, Rae Kramer, may have inadvertently been omitted, since a Notice of Appeal from her is included in the Record on Appeal (at R. 13).

STATEMENT OF FACTS

The defendants were arrested on October 25, 2012, and arraigned in the Town of Dewitt by the Hon. Donald M. Benack, Jr., who issued temporary Orders of Protection directing the defendants to stay away from the home, school, business and place of employment of Earl A. Evans (R. 56-79). As Commander at the Air National Guard base, Colonel Evans provided the court with a supporting disposition describing how the protestors had blocked entrances to the base and asking for Orders of Protection (R. 55). The temporary Orders of Protection were continued by Judge Gideon on October 30, 2013 (R. 148-160).

TRIAL

A joint trial of the defendants and two other codefendants commenced before Judge Gideon on January 3, 2014, and concluded on January 31, 2014, with closing arguments on that date (R. 1188-1289). The court reserved decision and adjourned the case one week for the court to review the evidence and then deliver the verdict (R. 1288).

The People's Case

On October 25, 2012, at approximately 8:00 a.m., the defendants, a group of drone protestors, gathered outside Hancock Airfield (R. 230, 318). Colonel Earl Evans was employed at the New York National Guard 174th Attack Wing, located at Hancock Airfield (the base) (R. 228-230). He is responsible for overseeing security at this base (R. 229-230, 236). According to Colonel Evans, none of the defendants had permission to be at the gate or in front of it (R. 230). All three gates were closed by the defendants for about two and half to three hours preventing people from entering or exiting the base (R. 245). Colonel Evans testified that he saw protesters at the gate (R. 270). The gates were shut down for about 2½ hours that day, preventing people from getting on and off the base before the defendants were removed, (R. 245). When cross-examined by defendant Daniel Burgevin, Colonel Evans testified that he recognized him and recalled seeing him at a previous protest (R. 275-276).

Chief Master Sergeant Michael Ramsey, who manages the security force at the base, confirmed in his testimony that none of the defendants had permission to be at the gates (R. 281-284). The three gates were under video surveillance (R. 290) and four cameras recorded what happened (R. 294). This video footage was received as evidence and played in court (see R. 294-295). Sergeant Ramsey testified that the blocked gates prevented deliveries from being made and people from coming into work (R. 284). Sergeant Ramsey was originally at the control center, then moved to the gate as the protest continued (R. 301).

The first surveillance video showed the defendants arriving and beginning to block the access road at the East Malloy Road gate (R. 297), which is the main entry point of the base (R. 304). The video from the Thompson Road gate showed people walking towards the gate (R. 362). This gate was not manned the day of the protest, but people were sent down there when the defendants began to arrive (R. 363). The Thompson Road gate was going to be used as an alternative exit with the main gate being blocked (R. 365).

At the Thompson Road gate there were movable metal barriers that were used to prevent vehicles from ramming the gate (R. 365). The barriers were not removed because there was no time to do so before the protesters arrived (R. 371). Cars were blocked from entering the gate because protesters were there and the metal barriers were unable to be removed (R. 373).

Vehicles were sent to the Town Line Road gate after the other two gates were blocked (R. 403-404). Active traffic was going through that gate up until the personnel at the gate were notified that the defendants were approaching (R. 404-405). The personnel at the gate closed the gate and moved back into place (R. 405). The video footage showed two vehicles, a Honda and a Mustang, trying and failing to get on to the base because all the entrances were blocked (R. 407).

Sergeant Ramsey explained that the rationale behind closing the gates to the base when the protesters arrived was to prevent the protesters from walking onto the base, which had happened with other Air Force bases and with other protest groups (R. 430). Additionally, cars were not allowed onto the base while the protesters were blocking the gates because they did not want anyone to get hurt (R. 431). Sergeant Ramsey testified about an incident that had happened where a car had gone through the protesters, taking part of a banner and a person with it (R. 431).

Colonel Evans and Sergeant Ramsey both testified that the property of the base extends to the center line of Malloy Road (R. 232, 304). An easement is provided to the Town of DeWitt

that runs about 25 feet towards the base (R. 305-306). The easement provides utility access and drainage for road safety, in addition to allowing for the use of the road itself (R. 348).

Sergeant Ramsey heard a warning given to the protesters to leave and instructing them that if they did not leave they would be arrested (R. 321). A lengthy amount of time passed after the warning was given. One person crossed the road to the other side (R. 322). At the protest, Sergeant Ramsey recognized Ed Kinane, Elliot Adams, Rae Kramer, James Ricks and Clare Grady, and positively identified them at trial (R. 322-341). He also testified that he could not pick out Mary Ann Grady Flores at trial (R. 335).

Sergeant Nicholas Nami of the Onondaga County Sheriff's Department testified that at 8:30 in the morning on October 25, 2015, the police received a call from the Air Force base about protesters (R. 525). Upon arrival at the Malloy Road gate, Sergeant Nami met with Sergeant Moynihan of the New York State Police and Sergeant Norton of the DeWitt Police (R. 525). He informed Lieutenant Dailey about the protesters and Lieutenant Daily went to the base (R. 485-486).

When Lieutenant Dailey arrived, he saw that the protesters were carrying signs and were just inside of the driveway off of Malloy Road. The protesters had traffic cones set up so that people could not turn in (R. 487). He was informed by the State Police that a warning to leave or be arrested had been given (R. 488). Lieutenant Daily had a couple of conversations with some of the defendants, telling them that they would be arrested if they did not leave (R. 489). When he knew that the transport bus was coming, he made a couple of announcements that they were blocking the roadway, not allowing traffic in, and that they would be arrested for trespassing and disorderly conduct (R. 489). Deputy Ferazzoli also testified that Lieutenant Daily gave a warning to the protesters prior to them being arrested (R. 565). The protesters were given time to leave (R. 489).

Before the arrests, a discussion occurred about what to do with the defendants should they refuse to leave (R. 526). It was decided that more personnel and transport would be needed if they needed to arrest the defendants (R. 526-527). The arriving officers met at a location away from the base and arrived together in a transport van to avoid any additional disruption of traffic (R. 527). When the transport van arrived, Lieutenant Daily made an announcement at the main gate for the defendants to disperse (R. 527). They were told that they were trespassing and that they would be arrested if they did not leave (R. 527). The defendants were informed that they needed to get out of the roadway so that people could go to and from the Air Force base (R. 528).

When the defendants refused to leave, the police took the defendants into custody and identified them through their driver's licenses or other forms of identification (R. 527). Some of the defendants were then placed in the transport van before the police went to the other gates to deal with the defendants there (R. 527-528). At the Town Line Road gate, Lieutenant Daily gave another warning to disperse out of the roadway (R. 529). Those who refused to do so were taken into custody and placed in the transport van (R. 529).

After that, Lieutenant Dailey went to the Town Line Road gate where there were more defendants (R. 490). He saw three more of the defendants holding signs (R. 490). Before the transport bus arrived, Lieutenant Daily spoke with the defendants and informed them that they would be arrested if they did not leave (R. 491). Once the transport bus arrived, the defendants were asked again if they wanted to leave or be arrested (R. 491). Lieutenant Daily then took their signs and the defendants were arrested (R. 491).

From there, the police moved to Thompson Road where Sergeant Nami gave the warning to disperse or they would be arrested (R. 529-530). Sergeant Nami testified that when the defendants refused to leave, he went up to the four defendants who were there and asked them if they were going to leave (R. 530). When they refused to leave, Sergeant Nami told them

that they would be taken into custody by one of the officers (R. 530). If the defendants had left they would not have been arrested (R. 532). Sergeant Nami explained that compliance with the order to disperse would have been accomplished by leaving the road to allow traffic to enter and exit the base, and would have included moving to the grass or other area not in front of the gate (R. 532).

Deputy Ferazzoli testified that he approached one of the defendants and asked if he was refusing to leave, to which the protester replied "yes" (R. 566). The defendant was taken into custody and identified as Elliot Adams (R. 566). Deputy Ferazzoli then went to the second gate where he heard Lieutenant Dailey give another order to disperse and when the defendants did not leave, the officers were told to arrest them (R. 568). Once again Deputy Ferazzoli approached a defendant and asked if he was refusing to leave and that defendant replied "yes" (R. 568-569). The defendant was then arrested and identified as Mark Colville (R. 569). From there, Deputy Ferazzoli went to the third gate where Sergeant Nami gave the order to disperse (R. 571). Once again Deputy Ferazzoli went up to a defendant and asked if he was refusing to leave and was once again told "yes" (R. 571). The defendant was placed under arrested and identified as Brian Hynes (R. 571).

Deputy Fuller arrived at the main gate and heard the order to disperse, but could not remember if it was Lieutenant Daily or Sergeant Nami who gave the order (R. 600-601). He testified that a few people dispersed, but that others remained. He was instructed to arrest those who remained (R. 601). He approached one of the defendants, James Ricks, and said that he could either leave or be arrested (R. 601). Ricks made no indication that he wanted to leave and when he did not leave Deputy Fuller placed him under arrest (R. 602). Deputy Fuller did not arrest anyone at the Town Line Road gate (R. 604), but did arrest Mary Anne Grady Flores at the

Thompson Road gate (R. 604-605). He told her to leave or she would be arrested, and she did not leave (R. 605).

Deputy Collins went to Thompson Road just north of Malloy Road to meet with other officers (R. 616). Deputy Collins then went to the Malloy Road gate where she saw people standing in the driveway area of the base (R. 616-617). Deputy Collins heard Lieutenant Dailey give a warning to leave or be arrested (R. 616). When the defendants refused to leave, Deputy Collins approached one of the women, identified as Judith Bello, and told her that she was under arrest (R. 618). Deputy Collins next went to the Town Line Road gate where she did not arrest anyone (R. 619). At the Thompson Road gate, she heard Sergeant Nami give an order to disperse. Deputy Collins approached a woman, identified as Clare Grady, who refused to leave. Deputy Collins placed her under arrest (R. 619-620).

Deputy Munroe went to Town Line Road where she heard a warning to disperse or be arrested (R. 632). Deputy Munroe arrested Mark Scibilia-Carver at the Town Line Road gate (R. 632-633). Officer McNeil observed numerous people at the front entrance of the base (R. 643). He did not remember hearing any instructions to the protesters to leave (R. 643). Officer McNeil arrested Edward Kinane at the gate (R. 644).

Officer Ellis received a call to go to the National Guard Air Base and was told by his sergeant to go to the Thompson Road gate (R. 730). Officer Ellis saw between 8 and 12 protesters at the gate and told them that they needed to leave or they would be arrested (R. 731). They all dispersed. He then went back to the main gate (R. 731). At the main gate, Officer Ellis heard a warning to leave or be arrested and when people did not comply, arrests were made (R. 732). Officer Ellis approached a defendant and told him to leave the area or be arrested (R. 732). The defendant, identified as Daniel Burgevin, replied that he was not going to leave (R. 732-733).

Officer Baumann testified to making an arrest at the main gate at East Malloy Road (R. 748-749). He approached one of the defendants (R. 749). The defendant was identified from her driver's license as Patricia Wieland (R. 750-751).

Deputy Hanslip, upon arrival at the main gate, saw some of the defendants holding signs and blocking the main gate to the base with cones (R. 760). Deputy Hanslip was sent to the Town Line Road gate where she saw some of the defendants with signs blocking the gate (R. 761-762). Warnings were given to leave or be arrested (R. 762). Deputy Hanslip repeated these warnings to move or be arrested before placing a defendant under arrest (R. 762). The defendant that Deputy Hanslip arrested was Rae Kramer (R. 763).

Deputy Andrews received a call about a disturbance at the base. After a meeting in a parking lot off of Thompson Road, Andrews went to the main gate on Malloy Road (R. 779). At the gate he saw several protesters blocking the entrance (R. 780). Lieutenant Daily gave an order to disperse and then arrests were made (R. 780). Deputy Andrews arrested Paul Frazier, who was identified at the police station (R. 781).

Cross-examination of Colonel Evans included questions concerning his duties at the base (R. 235-239, 257-258). The defendants also questioned Colonel Evans about the Order of Protection. The court sustained the People's objections to these questions (R. 242-243, 247-248, 265, 276, 397). Defendant Clare Grady asked Colonel Evans if he saw her at the gate. He replied that he could not identify her (R. 270). The defendants cross-examined Sergeant Ramsey about the easement, base boundaries, and about base property (R. 316, 346, 351, 354, 375-376, 385). Sergeant Ramsey, Lieutenant Daily, Sergeant Nami, and the arresting officers acknowledged that none of the protesters exhibited violent or aggressive behavior (R. 314-315, 518, 553, 578, 580, 608, 624, 636, 648, 740, 755).

While cross-examining the police officers who arrived on the scene, the defendants asked about their signs being thrown over the base fence (R. 504-505). Lieutenant Daily testified that the police tossed the signs over the fence to secure them (R. 504-505).

Lieutenant Dailey was able to identify defendant Rae Kramer at trial (R. 509). Deputy Ferazzoli was unable to identify defendant Elliot Adams in court because of the amount of time that had passed (R. 567). Deputy Ferazzoli was able to identify defendant Mark Colville at trial (R. 570), but was unable to identify Brian Hynes owing to the time that had passed (R. 572). Deputy Fuller was able to identify defendant James Ricks in court (R. 603) and identified defendant Mary Anne Grady Flores, but admitted he was not 100% sure of that identification (R. 607). Deputy Collins identified defendant Judith Bello and Clare Grady at trial (R. 621-622). Deputy Munroe was able to identify defendant Mark Scibilia-Carver at trial (R. 634). Officer McNeil identified defendant Edward Kinane at trial (R. 645-646).

Officer Ellis was unable to identify defendant Daniel Burgevin in court owing to the length of time that had passed (R. 735). He identified Burgevin on the day of the arrest by looking at his driver's license (R. 733). Officer Baumann was unable to identify defendant Patricia Wieland at trial owing to the length of time that had passed, but obtained identification from her on the day of the arrest (R. 750-751). Deputy Hanslip identified defendant Rae Kramer at trial (R. 764-765). Deputy Andrews identified someone else as defendant Paul Frazier during trial (R. 784-785). Deputy Andrews agreed that owing to the length in time from arrest to trial, he could have forgotten what defendant Frazier looked like (R. 785).

After the testimony of Deputy Andrews the People rested. The People moved to dismiss the charges of trespass and disorderly conduct against codefendant Andrea Levine because the arresting officer could not be at court and the court dismissed the charges (R. 805). At the close of the People's case, the defendants moved to dismiss the charges of trespass and disorderly

conduct on the grounds that the People did not have sufficient evidence to prove their case (R. 808-829). The People argued that the court should deny the motions (R. 808-829). The court reserved decision (R. 829).

The Defendants' Case

The defendants wanted to call Professor Francis Boyle as an expert witness to testify about the law and background to explain their intent and state of mind (R. 832-833). After a lengthy discussion, the court allowed defendants to submit a memorandum that Professor Boyle could write if the defendants wanted (R. 946-968).

Nine of the defendants testified. In their testimony, all nine admitted to being at Hancock Air Field on October 25, 2012 (R. 870, 899, 917, 983, 1019, 1047, 1093, 1122, 1146). The nine defendants who testified admitted to being either in the road or on pavement and to being arrested on pavement and not on the grass (R. 871, 899-900, 921-923, 1004, 1030, 1050, 1093, 1146). The defendants testified that their reason for being at the gate was to protest the use of drones, violations of international law, to stop the war crimes that were being committed on the base, and to deliver an indictment to the base (R. 864, 879, 912, 1018-1019, 1047, 1086, 1095, 1123, 1147).

Seven of the nine defendants testified that the protesters were there between 110 and 120 minutes (R. 877, 900, 917, 1005, 1029, 1051, 1151). Six of the defendants testified that they heard the warnings to leave but did not leave (R. 876, 901, 1005, 1053, 1094, 1131).

At the close of the defendants' case, the court dismissed the charge against one codefendant (R. 1160). For the purposes of this brief, that codefendant's conduct at trial is not included.

VERDICT AND SENTENCING

The court found the defendants not guilty of trespass and guilty of disorderly conduct (R. 1294-1298, 1365-1370). The court explained its rationale for finding the defendants guilty. The court said "in reviewing the testimony and evidence presented at trial, it clearly shows that vehicle and pedestrian traffic was obstructed by the defendants at all three gates to the base" (R. 1297, 1369). The court referenced People's exhibit two, containing the video footage of the gates as showing "several cars approaching at each of the gates, stopped by defendants forming a human barrier complete with orange cones" (R. 1297, 1369). The court noted that a car almost hit one of the defendants, and at the Thompson Road gate, two drivers got out of a vehicle and looked like they had a confrontation with some of the defendants (R. 1297, 1369-1370).

Despite some of the defendants' claims that they were there to address grievances with the government, the court found that their intent was to "rattle the chains" and not to be ignored (R. 1297, 1370). The court sentenced the defendants to 15 days in the Onondaga County Correctional Facility (R. 1298). Orders of Protection were issued on behalf of Colonel Evans, with an expiration date of February 7, 2016, for all the defendants except Elliot Adams, whose Order of Protection expires on February 24, 2016 (see R. 1412-1414). The defendants acknowledged the Orders of Protection and said they understood, but refused to sign the Orders of Protection (R. 1357-1361, 1391).

POINT I

THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE GUILTY VERDICT FOR DISORDERLY CONDUCT AND THE VERDICT WAS NOT AGAINST THE WEIGHT OF THE EVIDENCE

The defendants' argue in Point I of their brief (at 28-32) that the trial proof was insufficient to establish the "public" element of disorderly conduct. Defendant's claim is without merit.

In determining whether there is sufficient evidence to sustain a conviction, this Court must, viewing the evidence in the light most favorable to the People's witnesses, determine whether any rational finder of fact could have found the elements of the crime were established beyond a reasonable doubt (People v Contes, 60 NY2d 620, 621 [1983]). Resolving issues of credibility, as well as the weight to be accorded the evidence presented, are primarily questions to be determined by the fact-finder at trial (People v Romero, 7 NY3d 633 [2006]). The fact-finder's determination should be accorded great weight on appeal and should not be disturbed unless clearly unsupported by the record (People v Villante, 204 AD2d 369, 370 [2nd Dept 1994], lv denied 84 NY2d 834 [1994], citing People v Garafolo, 44 AD2d 86, 88 [2nd Dept 1974]).

An appellate court must take a two-step approach when asked to weigh the evidence. First, the appellate court must determine whether an acquittal would have been reasonable (People v Danielson, 9 NY3d 342, 348 [2007]). Second, if this Court determines that a different finding would not have been unreasonable, "then the appellate court must, like the trier of fact below, 'weigh the relative probative force of conflicting testimony' " (People v Bleakley, 69 NY2d 490, 495 [1987]). Moreover, where witness credibility is "of paramount importance" in determining a defendant's guilt, "the appellate court 'must give great deference to the fact-finder's opportunity to view the witnesses, hear the testimony and observe demeanor' " (People v Harris, 15 AD3d 966, 967 [4th Dept 2005], lv denied 4 NY3d 831 [2005], quoting People v

Bleakley, 69 NY2d at 495); see also People v Catlin, 41 AD3d 1199 [4th Dept 2007], lv denied 9 NY3d 873 [2007]).

Only if it appears that the trier of fact has failed to give the evidence the weight it should be accorded may the appellate court set aside the verdict (People v Bleakley, 69 NY2d at 495). Resolution of issues of credibility, as well as the weight to be accorded to the evidence presented are primarily questions to be determined by the finder of fact at trial (see People v Romero, 7 NY3d 633, 643-644 [2006]; People v Mateo, 2 NY3d 383, 410 [2004]). Those determinations should be given great weight on appeal and should not be disturbed unless clearly unsupported by the record (People v Nucci, 162 AD2d 725, 726 [2nd Dept 1990], lv denied 76 NY2d 862). The finder of fact at trial has a superior vantage point and opportunity to determine the credibility of the witnesses; that determination of credibility should be given "[g]reat deference" (People v Valencia, 263 AD2d 874, 876 [3rd Dept 1999], lv denied 94 NY2d 799 [1999]). Issues of credibility, and the weight to be given to a witness's testimony, are questions for the fact-finder, who heard and saw the witnesses (People v Wells, 18 AD3d 482 [2nd Dept 2005], lv denied 5 NY3d 811 [2005]). A fact-finder is free to accept or reject a witness's testimony in whole or in part, and a reviewing court should not "speculate on the content of the fact-finder's deliberations" (People v Wells, 18 AD3d at 483 [citation omitted]).

Here, the proof was legally sufficient and the verdict was not against the weight of the evidence. The court, acting as both the trier of fact and trier of law, was in the best position to weight the video evidence and the testimony given by the witnesses and the defendants. There is nothing to suggest that the court did not give the evidence presented the weight it was accorded. The record supports the court's decision to find the defendants guilty of disorderly conduct.

The Court of Appeals has "steadfastly upheld" the constitutionality of this State's disorderly conduct statute (People v Tichenor, 89 NY2d 769, 774 [1997], cert denied 522 US

918 [1997]). In a case from Onondaga County, the Court of Appeals and the United States Supreme Court upheld the constitutionality of an earlier version of the disorderly conduct statute, recognizing the need to have a law that protects the public order (People v Fenner, 300 NY 391, 400 [1950], affd 340 US 315 [1951]). The statute protects against public inconvenience, annoyance or alarm in an effort to deter breaches of the peace and prohibit public nuisances (see People v Tichenor, 89 NY2d at 773-774).

To prove the commission of disorderly conduct under Penal Law § 240.20 (4), the People must establish that a defendant, with "intent to cause public inconvenience, annoyance or alarm" or recklessly creating "a risk thereof" obstructed vehicular or pedestrian traffic. To determine whether the record supports an inference that a defendant acted in a manner that created a "public harm," courts have considered many factors, including "the time and place of the episode under scrutiny; the nature and character of the conduct; the number of other people in the vicinity; whether they are drawn to the disturbance and, if so, the nature and number of those attracted; and any other relevant circumstances" (People v Baker, 20 NY3d 354, 360 [2013]; People v Weaver, 16 NY3d 123, 128 [2011]).

There is no per se requirement that members of the public must be involved or react to the incident in order to have sufficient proof of disorderly conduct (People v Weaver, 16 NY3d at 128; see People v Zuckerberg, 44 Misc 3d 66, 66 [2nd App Term 2014]). Rather, the attention generated by a defendant's activities, or the lack thereof, is a relevant factor to be considered in the public dimension calculus. The Court of Appeals has made clear that a defendant may be guilty of disorderly conduct regardless of whether the action results in actual public inconvenience, annoyance or alarm; the risk that the conduct recklessly creates a risk of such public disruption is sufficient (People v Weaver, 16 NY3d at 128; see also People v Baker, 20 NY3d at 359).

Here, the defendants were properly found guilty of disorderly conduct. The defendants' conduct prevented people from going to work and prevented deliveries from being made (R. 284). The video surveillance from the base showed several vehicles being blocked by the protesters, a defendant almost being hit by a vehicle, and two drivers exiting there vehicles to confront defendants (R. 1297, 1369-1370). The defendants began their protest at around 8:00 a.m. (R. 318), placing orange cones in front of the base to block the entrance (R. 877-878), and remained at the base between 110 to 120 minutes (R. 877, 900, 917, 1005, 1029, 1051, 1151).

The court found that defendants' intent was to "rattle chains" and not be ignored (R. 1297, 1370). The defendants were attempting to draw attention to their cause by their actions and by their failure to disperse when ordered to by police. Regardless of how many members of the public were present at the time, the trial court properly found that the conduct of the defendants created a risk of public disruption. The defendants were given multiple opportunities to disperse prior to arrest and they deliberately ignored the warning (R. 876, 901, 1005, 1053, 1094, 1131).

The People were not required to prove that the defendants were in a public place. Only subdivisions three and six of Penal Law § 240.20 have a public place requirement, and here the defendants were charged under subdivision five. And while disorderly conduct has a public harm element, that element was established here. Regardless of the precise location of the boarder of the property belonging to the base, the defendants were outside the gates, blocking access to the base. Both those members of the public who work on the base and members of the public wishing to use the roads that were blocked faced the risk of inconvenience, annoyance and alarm. Indeed, that was the purpose of the actions of the defendants. While the defendants now argue in their brief (at 29) that they were on base property when the police arrested them, that does not exonerate them. The trial court properly found that the defendants intended to cause

public inconvenience or recklessly created a risk of public inconvenience (R. 1297-1298, 1316-1317). And while actual public disorder is not required – the risk of public disorder is sufficient to satisfy the statute (see People v Weaver, 16 NY3d at 128) – here, the court properly found that the defendants did in fact obstruct vehicle and pedestrian traffic (R. 1297-1298, 1316-1317).

Defendant provides no support of their apparent position that people employed on the base are somehow not members of the public (see defendant's brief at 29-30). Defendants only cite the testimony of two of the defendants, Brian Hynes and Patricia Wieland, who claimed that no members of the public were present (R. 1071, 1134-1135). The court was not required, based on this testimony, to ignore the risk of public inconvenience presented by the facts of this case, or to find that a person employed on the base could not be a member of the public. And the court specifically found, based on the video evidence, that one car almost hit a defendant, two drivers got out of their cars and appeared to engage in a confrontation with the defendants, cars were stopped by the "human barrier" created by the defendants at all of the gates, and cars turned around in traffic to leave (R. 1297, 1316).

The defendants' reliance on People v Baker (20 NY3d at 357-360) is misplaced. In People v Baker, the charge of disorderly conduct arose from an exchange between the defendant and a police officer. The exchange in People v Baker drew a crowd of about 10 people by the time the defendant was arrested (id. at 357). The Court of Appeals in People v Baker said "a person may be guilty of disorderly conduct only when the situation extends beyond the exchange between the individual disputants to a point where it becomes a potential or immediate public problem" (id. at 359-360, quoting People v Weaver, 16 NY3d at 128). The Court found that the public harm element was lacking in that case because it was in daylight hours, only two statements were made by the defendant, the incident lasted about 15 seconds, and there was

nothing to infer that the police officer who was present felt threatened (People v Baker, 20 NY at 362).

People v Baker differs from this case for numerous reasons. As previously mentioned, the defendants here remained at the entrance to the base between 110 to 120 minutes (R. 877, 900, 917, 1005, 1029, 1051, 1151), and refused to leave after receiving numerous warnings to disperse (R. 876, 901, 1005, 1053, 1094, 1131). The defendants' actions demonstrated that their intent was not just to get the attention of the members of the public who are base personnel, but also to get general public attention for their cause by blocking access to the base. A defendant was almost hit by a car and at least two drivers exited there vehicles and confronted some of the defendants (R. 1297, 1369-1370).

This case is also distinguishable from People v Johnson (22 NY3d 1162 [2014]). The only event that occurred in People v Johnson was that the defendant and three others were partially blocking an entrance to a store, with no evidence of people attempting to enter or exit the store (id.). Here, there is testimony and video evidence of people attempting to enter the base and being physically blocked by the defendants (R. 407). Sergeant Ramsey testified about deliveries being unable to occur because of the protesters (R. 284). The defendants did not merely block one entrance or exit to the base. All three entrances to the base were blocked, making it impossible for people to get onto and off the base (R. 283-284).

This case also differs from People v Munafo (50 NY2d 326 [1980]), which involved a defendant who was on a secluded part of his own property, far from any public thoroughfare or business (People v Munafo, 50 NY2d at 331). There was also nothing to indicate that the defendant in People v Munafo attempted to incite or involve spectators who were present before the confrontation (id. at 332). This differs from the defendants here, who were blocking three

gates at the base (R. 283-284). Their conduct created a risk of public inconvenience, annoyance or alarm by blocking traffic and access to the base.

This Court should affirm defendant's conviction.

POINT II

THE ORDERS OF PROTECTION WERE PROPERLY ISSUED

The defendants argue in Point II of their brief (at 32-37) that the Orders of Protection are invalid because no good cause was shown for their issuance. They also claim that the Orders of Protection chill the defendants' First Amendment rights. Defendants' claims, to the extent, if any, that they are not moot, are unpreserved and without merit.

The defendants' claims are unpreserved. The defendants in their brief do not claim otherwise or ask for relief in the interest of justice (see CPL 470.05 [2]; CPL 470.15 [3] [c]; CPL 470.15 [6]). The defendants failed to object to the Orders of Protection on these grounds at the time the Orders of Protection were issued (People v Shampine, 31 AD3d 1163, 1164 [4th Dept 2006]; People v Nieves, 2 NY3d 310, 316 [2004]; see also People v Reid, 21 AD3d 1215, 1216 [3rd Dept 2005]; People v Dixon, 16 AD3d 517 [2nd Dept 2005]). The defendants raised no objections to the Orders of Protection on the grounds now raised at the time they were issued.

Additionally, the defendants' claims regarding the temporary Orders of Protection may be moot, since the temporary Orders of Protection are no longer in effect. The claim regarding the two-year Orders of Protection, if this appeal is decided after they expire, would similarly be moot (see People ex rel. Finlay v Gideon, 129 AD3d 1632, 1633 [4th Dept 2015]).

In any event, the court properly issued the Orders of Protection. An order of protection may be issued in favor of a witness designated by the court as well as the "victim or victims of the offense and such members of the family or household of such victim or victims as shall be

specifically named by the court in such order" (People v Shampine, 31 AD3d at 1164; CPL 530.13 [4] [b]; see CPL 530.12 [5] [a], [c], [d]; 530.13 [4] [a]; People v Petrusch, 306 AD2d 889, 890 [4th Dept 2003]).

Permanent Orders of Protection were granted on behalf of Colonel Evans at sentencing (R. 1356, 1390). The court had ample grounds, based on the proof presented at trial, which included testimony from Colonel Evans, to conclude that Colonel Evans was both a witness and a victim. As a person who worked at the base and was responsible for security at the base, Colonel Evans was a proper recipient of the Orders of Protection. Similarly, Colonel Evans's supporting disposition (R. 55), supported the issuance of the temporary Orders of Protection.

This case differs from People v Raduns (70 AD3d 1355 [4th Dept 2010]). In that case, the individual who was granted an Order of Protection was neither a victim nor a witness to the crime that the defendant pleaded guilty to (id. at 1355). Here, there is a signed supporting deposition from Colonel Evans regarding what happened on October 25, 2012 (R. 55). Colonel Evans's statement explains that the protesters blocked the gates to the base forcing them to use gates not normally used and how eventually all three gates were blocked (R. 55). And Colonel Evans testified at trial that he saw protesters at the gate and that he recognized one of the defendants from a previous protest (R. 270, 275-276).

The defendants' reliance on People v Somerville (72 AD3d 1285 [3rd Dept 2010]) is misplaced. In People v Somerville, an Order of Protection was issued to an individual who had testified that he did not witness the defendant's altercation with the police (People v Somerville, 72 AD2d at 1288). Colonel Evans in this case testified to seeing protesters at the gate (R. 270) and he even recognized a defendant from a previous protest (R. 275-276). Defendants also rely on People v Panetta (941 Misc 3d 614 [Middletown City Ct 2013]). But in that case there was no indication that the members of the rescue organization were victims or witnesses to the

charges contained in the superseding information (People v Panetta, 41 Misc 3d at 620). As mentioned previously, Colonel Evans saw protesters at the gate and recognized a defendant from a prior protest (R. 270, 275-276).

The defendants argue for the first time in this appeal that the Orders of Protection violate the First Amendment. This Court should not review this unpreserved claim (see CPL 470.05 [2]). And even if this Court reviews this claim, it should reject it.

In issuing the Orders of Protection, the trial court did not specifically address this issue. Speaking more generally, however, the court said "the exercise of constitutional rights, there's a delicate balance. It has limits where it impinges on the rights of others. Each person has their own constitutional rights and when the two conflict, it's a delicate balance on who should have the authority versus the other" (R. 1353, 1385).

Constitutional free speech protections " 'have never been thought to give absolute protection to every individual to speak whenever or wherever he pleases, or to use any form of address in any circumstances that he chooses', a person's right to free expression may be curtailed 'upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner' " (People v Shack, 86 NY2d 529, 535-536 [1995]; quoting Cohen v California 403 US 15, 19, 21 [1971]).

The defendants' reliance on People v Golb (23 NY3d 455 [2014]) is misplaced. In People v Golb, a part of the harassment statute was struck down as unconstitutional because there was "no fair reading" of the statute because the scope of the effected speech was not clearly defined (People v Golb, 23 NY3d at 467). Here, all that the defendants were ordered to do is stay away from Colonel Evans's place of business, home and work. There is no limitation in what they can say. There are ample places where the defendants can protest without violating the Orders of Protection. There is no over broad use of the Orders of Protection. They were

properly issued to protect a witness to the incident where the defendants victimized him, and others, by their conduct.

The Orders of Protection issued here do not chill freedom of speech as defendants claim. The Orders of Protection provide no more and no less protection than they would if they were issued to any other victim or witness to an offense. No more speech than necessary is being burdened by these Orders of Protection. Defendant's reliance on Schenck v Pro-Choice Network of Western New York (519 US 357 [1997]), is misplaced. The United States Supreme Court found in that case that the floating buffer zones were unconstitutional where there was a 15-foot buffer zone around people entering and exiting the building (id. at 377-378). The Court upheld the fixed buffer zones around the doorways, driveways, and driveway entrances (id. at 380). The Orders of Protection in this case are more akin to the fixed buffer zone found permissible in Schenck than to the floating buffer zone.

Defendants' claims are unpreserved and without merit. This Court should deny any relief.

POINT III

THE CHARGES WERE NOT DUPLICITOUS

Defendants' argue in Point III of their brief (at 37-30) that the charges were duplicitous. Defendant's claim is without merit.

A defendant is required to preserve a claim of duplicitous for that claim to be reviewable on appeal as a matter of law (People v Allen, 24 NY3d 586, 591 [2014]; People v Becoats, 17 NY3d 643, 651 [2011]). Defendants here failed to preserve this argument for review because they did not challenge the accusatory instrument as duplicitous (People v Thomas, 114 AD3d 1138, 1139 [4th Dept 2014], lv denied 24 NY3d 965 [2014]; see CPL 255.20 [1]; People v

Brown, 82 AD3d 1698, 1700 [4th Dept 2011], lv denied 17 NY3d 792 [2011]). The only mention of duplicitousness was in one defendant's closing argument (R. 1231), not in a motion to dismiss.

In any event, this claim lacks merit. An indictment is duplicitous when a single count charges more than one offense (People v Casiano, 117 AD3d 1507, 1509 [4th Dept 2014]). Each count of an indictment may charge one offense only (CPL 200.20 [1]). "Acts which separately and individually make out distinct crimes must be charged in separate and distinct counts, and where one count alleges the commission of a particular offense occurring repeatedly during a designated period of time, that count encompasses more than one offense and is duplicitous" (People v Bauman, 905 NY3d 152, 154 [2009]; quoting People v Keindl, 68 NY2d 410, 417-418 [1986]).

A duplicitous indictment may fail to give a defendant adequate notice and opportunity to defend; it may impair his [or her] ability to assert the protection against double jeopardy in a future case; and it may undermine the requirement of jury unanimity, for if jurors are considering separate crimes in a single count, some may find the defendant guilty of one, and some of the other (People v Casiano, 117 AD3d at 1509). Dismissal is one remedy for duplicitous pleading but it is not the only remedy (People v Elliot, 41 Misc 3d 1228(A), 4 [Crim Ct, New York County 2013]; People v Evangelista, 1 Misc 3d 877, 878 [Crim Ct, Bronx County 2003]). A duplicitous pleading can be cured by the filing of a superseding information, a prosecutor's information or a bill of particulars (People v Elliot, 44 Misc 3d at 4; People v Evangelista, 1 Misc 3d at 878; see also People v Davis, 72 NY2d 32, 38 [1988]). Potential duplicitousness can also be cured by a jury instruction (People v Elliot, 44 Misc3d at 4).

Here, trespass and disorderly conduct were listed on the accusatory instruments (R. 29-54). The accusatory instruments listed the section of Penal Law where the violations could be

found (R. 29-54). The charges were separate counts on the accusatory instruments (R. 29-54). Count one states "a person is guilty of disorderly conduct when, with intent to cause public inconvenience, annoyance or alarm or creating a risk thereof he obstructs vehicular or pedestrian traffic" (Penal Law § 240.20 [5]). Next, the accusatory instruments charged trespass: "A person is guilty of trespass when he knowingly enters or remains unlawfully in or upon premises" (Penal Law § 140.05). While it would have been a better practice to place the words, "Count Two" before the trespass charge, the failure to do so did not render the accusatory instruments duplicitous. After listing these two charges, the instruments describe the factual basis for the charges. A fair reading of the accusatory instruments leads to the conclusion that the alleged facts supported two separate charges.

In this case there was no chance of jury confusion due to the trial being a bench trial. The court found defendants not guilty of the trespass violation due to the lack of signs indicating the premise boundaries (R. 1296-1297, 1315-1316). Defendants were found guilty of disorderly conduct based on the evidence that cars were stopped by defendants, a defendant almost being hit be a vehicle, and defendants being confronted by drivers (R. 1297-1298, 1316-1317). Thus, the court treated the two charges as separate allegations. The concerns raised by duplicity are lacking. Both charges were clearly spelled out on the accusatory instruments (R. 29-54). And the dismissal of the trespass charge rendered any duplicity claim moot or harmless. This Court should reject this claim.

This Court should affirm the defendants' convictions and sentences.

CONCLUSION

The People respectfully ask this Court to affirm defendants' convictions and sentences.

Respectfully submitted,

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DATED: October 23, 2015