

**COURT OF APPEALS  
DECISION  
DATED AND RELEASED**

JULY 22, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

**No. 97-1009-CR**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**DONALD J. MINNIECHESKE,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Shawano County:  
EARL W. SCHMIDT, Judge. *Affirmed.*

CANE, P.J. Donald J. Minniecheske appeals a judgment convicting him of disorderly conduct, contrary to § 947.01(1), STATS. The State also alleged a criminal penalty enhancer under § 939.62, STATS. The sole issue on appeal is whether Minniecheske's conduct rose to the level of disorderly conduct. Because this court concludes that under the circumstances, Minniecheske's statement to the

Village of Tigerton's clerk was sufficient to support the jury's finding of disorderly conduct, the judgment is affirmed.

The underlying facts are essentially undisputed. On September 13, 1995, Charles Gehrman, the police chief for the Village of Tigerton, observed nine cows owned by Donald Minniecheske on village property which had been formerly owned by Minniecheske and his wife, Sally. Gehrman was there at the request of the Shawano County Sheriff's Department to act as security for the people surveying the property because they had refused to work on the property without an armed law enforcement officer with them. Gehrman called the village clerk, Tammie Berg, and asked her to call the Minniecheskes and ask that the cattle be removed. Berg called Minniecheske and informed him that the cattle had strayed onto village property and needed to be removed. Minniecheske protested to her that the land was his and that, instead, Chief Gehrman should be removed.

After Berg continued to ask him a number of times to remove the cattle, Minniecheske stated, "Do I have to bring in the armed militia to resolve this"? Berg described Minniecheske's tone of voice as "intimidating; polite but intimidating" and somewhat boisterous. Berg told Minniecheske not to call out the armed militia and, because of her past experience with the Minniecheske family, she interpreted his statement as a threat. She became frantic and informed Gehrman that Minniecheske was sending armed militia to the property and recommended that Gehrman and the surveyors leave the area. In response, Gehrman blocked the access road with his vehicle to the village property, armed himself and called the sheriff's department for back-up. As it turned out, no armed militia arrived, although Gehrman did encounter Sally Minniecheske at the property, resulting in an altercation and her arrest for disorderly conduct.

The issue whether Donald Minniecheske's conduct rose to the level of disorderly conduct is fact sensitive. The State contends that the jury had sufficient evidence to find that he engaged in disorderly conduct. On the other hand, Minniecheske contends that there was no evidence of "fighting words" and the conviction is unconstitutional.

Section 947.01, STATS., defines disorderly conduct as:

Whoever, in a public or private place, engages in violent, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly conduct under circumstances in which the conduct tends to cause or provoke a disturbance is guilty of a Class B misdemeanor.

The current standard for disorderly conduct in Wisconsin comes from *City of Oak Creek v. King*, 148 Wis.2d 532, 436 NW.2d 285 (1989). In *Oak Creek*, the analysis focuses on a combination of the conduct and the circumstances in which it occurred. *Id.* at 542, 436 N.W.2d at 288. In *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969), the Supreme Court stated: "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." Later, the Supreme Court again emphasized that the test for whether conduct crosses the border between an exercise of the right to free speech and disorderly conduct is whether the conduct is directed at producing imminent disorder. "[S]ince there was no evidence or rational inference from the import of the language, that his words were intended to produce, and likely to produce, imminent disorder, those words could not be punished by the State on the ground that they had 'a tendency to lead to violence.'" *Hess v. Indiana*, 414 U.S. 105, 109 (1973).

The question, then, is whether Minniecheske's statement, "Do I have to bring in the armed militia to resolve this" under the circumstances was likely to incite imminent disorder. The record supports the jury's finding that it was likely to provoke disorder when considering Minniecheske's past history with law enforcement officials and the circumstances under which it was made. Berg stated that she has been the village clerk for the last thirteen years and in the past she had observed Minniecheske with men in camouflage uniforms carrying weapons and had received claims from them that they believe they have the right to shoot and kill officers if they do not agree with what they are doing. Minniecheske could reasonably expect that his comments about bringing in an armed militia would be conveyed to Gehrman and the surveyors.

Gehrman described Berg as frantic when she called after talking to Minniecheske. Additionally, Gehrman has known Minniecheske all of his life and stated that he took this threat seriously. He has seen armed persons on the property before, and Minniecheske told him previously that with one phone call he could have hundreds of armed men down there, that they would need to open up a new cemetery in the Village of Tigerton and commented that there would be another Waco.

Here, the jury could rationally infer that under the circumstances, Minniecheske's words would likely produce imminent disorder. It not only tended to cause a disturbance, but went beyond that and actually caused a disturbance. One might argue in hindsight that Berg and Gehrman possibly overreacted, but based on their past experience with Minniecheske and his association with armed men, it was reasonable to take his statement seriously as a threat. Only Minniecheske can take blame for Berg and Gehrman's reaction to his "threat."

*By the Court.*—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.

