COURT OF APPEALS
DECISION
DATED AND FILED

December 15, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-2188-FT

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

IN THE INTEREST OF MICHAEL R.T., A PERSON UNDER THE AGE OF 17:

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL R.T.,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Shawano County: JOHN M. WIEBUSCH, Judge. *Affirmed.*

CANE, C.J. Michael R.T. appeals from a juvenile delinquency dispositional order for disorderly conduct relating to an incident in which he gave unmarked pills to a fellow elementary student on a school bus.[1] Michael contends

[1] This is an expedited appeal under RULE 809.17, STATS.

the evidence is insufficient to support a finding of disorderly conduct. This court disagrees and affirms the order.

When reviewing an insufficiency of the evidence assertion, Michael agrees that an appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the finding, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. ***State v. Poellinger***, 153 Wis.2d 493, 507, 451 N.W.2d 752, 757-58 (1990). If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn the verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it. *See* ***id***.

The standard of review is the same whether the evidence presented at trial is direct or circumstantial. *See* ***id***. at 503, 451 N.W.2d at 756. The test is whether this court can conclude that the trier of fact could, acting reasonably, be convinced of the person's guilt by evidence it had a right to believe and accept as true. *See* ***id***. at 503-04, 451 N.W.2d at 756. The credibility of witnesses and the weight of the evidence are for the trier of fact. *See* ***id***. In reviewing evidence to challenge a finding of fact, this court must view the evidence in the light most favorable to the finding, and if more than one reasonable inference can be drawn from the evidence, the inference which supports the finding is the one that we must adopt. *See* ***id***. Additionally, because this issue presents a question as to the application of law to uncontroverted facts, it is a question of law to be decided independently of the trial court's conclusions. ***City of Oak Creek v. King***, 148 Wis.2d 532, 539, 436 N.W.2d 285, 287 (1989).

Michael argues that because his only conduct in this case was furnishing a bottle of unmarked pills to a fellow eighth-grade student, Josh, on a school bus, the evidence is insufficient to support a finding of disorderly conduct. He also contends that he should not be responsible for the ensuing disturbance at school when Josh in turn gave these unmarked pills to other grade school students, took some himself, and later got sick. This court disagrees.

The facts are undisputed. While going to elementary school on the bus, Michael gave Josh a bottle of pills that he had obtained from home. The bottle was labeled "Jet Alert." The pills, however, were unmarked. Josh consumed two of these pills on the school bus and then consumed four more at school. He took these pills even though he did not know what they were. At school, Josh gave some of the pills to other students, and told the students the pills were vitamins. Josh became sick and vomited. As a result, the grade school principal learned of Josh's sickness and that other students had ingested some of the unmarked pills. Because no one seemed to know for certain what the pills were and because of Josh's illness, the principal was concerned for the safety of the students and had to take the pills to a doctor for identification. Additionally, she had to call law enforcement to investigate. The pills were later identified as caffeine.

In ***State v. Givens***, 28 Wis.2d 109, 115, 135 N.W.2d 780, 783-84 (1965), the supreme court held that there are two distinct elements of disorderly conduct under § 947.01(1), STATS.[2] First, the conduct must be of the type

[2] Section 947.01, STATS., provides: "**Disorderly Conduct.** 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."

enumerated in the statute or similar thereto in having a tendency to disrupt good order. ***Id***. Second, the conduct must be engaged in under circumstances which tend to cause or provoke a disturbance. ***Id***. It is undisputed that Michael's conduct does not fall directly into any of the specifically enumerated categories forbidden in the disorderly conduct statute. The question, therefore, becomes whether these facts will sustain the conclusion that his conduct was "otherwise disorderly." *See* ***id***.

In ***Givens***, the supreme court held the following regarding § 947.01(1), STATS.: "When the statute, after the specific enumerations, in a 'catchall' clause proscribes 'otherwise disorderly conduct' which tends to 'provoke a disturbance,' this must mean conduct of a type not previously enumerated but similar thereto in having a tendency to disrupt good order and to provoke a disturbance." ***Id***. at 115, 135 N.W.2d at 783-84.

> While it is impossible to state with accuracy just what may be considered in law as amounting to disorderly conduct, the term is usually held to embrace all such acts and conduct as are of a nature to corrupt the public morals or to outrage the sense of public decency, whether committed by words or acts.

Id. at 116, 135 N.W.2d at 784 (quoting ***Teske v. State***, 256 Wis. 440, 444, 41 N.W.2d 642, 644 (1950)).

Section 947.01, STATS., therefore, proscribes conduct in terms of results which can reasonably be expected therefrom rather than attempting to enumerate the limitless number of antisocial acts a person could engage in that would menace, disrupt, or destroy public order. ***State v. Werstein***, 60 Wis.2d 668, 671-72, 211 N.W.2d 437, 439 (1973). This is especially true regarding the

"otherwise disorderly" proscription wherein the relatedness of the conduct and the circumstances are of ultimate importance. ***Id***. at 672, 211 N.W.2d at 439.

In ***State v. Maker***, 48 Wis.2d 612, 616, 180 N.W.2d 707, 709 (1970), the supreme court observed:

> This court's emphasis upon the relatedness of conduct and circumstances in the statute is no more than a recognition of the fact that what would constitute disorderly conduct in one set of circumstances, might not under some other. When a famed jurist observed, "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic," the comment related to the crowdedness of the theater as well as to the loudness of the shout. It is the combination of conduct and circumstances that is crucial in applying the statute to a particular situation. (Footnote omitted).

Thus, simply giving unmarked pills to a fellow student cannot be viewed in a vacuum as Michael suggests. Rather, as observed in ***Oak Creek***, the fact finder may consider the overall conduct. *See* ***Oak Creek***. Here, the location of the offense was on the school bus with grade school students, and the circumstances were that Michael knew the pills would end up at the elementary school. Although the pills were in a labeled bottle, the pills were unmarked and unknown. Not surprisingly, a disturbance followed at the school when the principal found Josh vomiting and disoriented and found other students on the playground concerned for their safety after ingesting some of the pills. As a result, medical and police personnel had to be called to help. Based on these facts, the trial court could reasonably find that Michael's conduct was disruptive of good order and tended to cause or provoke a disturbance, constituting disorderly conduct. *See* ***id***.

By the Court.—Order affirmed.

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