COURT OF APPEALS DECISION DATED AND FILED

May 25, 2006

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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

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

Appeal No. 2005AP1642-CR

Cir. Ct. No. 2003CM803

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LEE RAVEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Columbia County: JAMES O. MILLER, Judge. *Affirmed*.

¶1 DEININGER, J.[1] Lee Raven, pro se, appeals a judgment convicting her of disorderly conduct. She asks us to reverse the judgment of conviction and order dismissal of the complaint or, alternatively, a new trial. She makes the

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[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2003-04). All references to the Wisconsin Statutes are to the 2003-2004 version unless otherwise noted.

following claims: (1) her three court-appointed counsel were ineffective; (2) the trial judge erred in denying her challenge to the accuracy of a transcript; (3) the trial court improperly denied her the opportunity to introduce an allegedly exculpatory audio recording of the incident; (4) the evidence was insufficient to support the conviction. We affirm.

BACKGROUND

¶2 Lee Raven appeals a judgment convicting her of disorderly conduct in violation of WIS. STAT. § 947.01 on the basis of an incident that occurred at a family-owned drug store, Sharrow Drugs in Columbus. Raven went to the pharmacy to pick up a prescription. She became loud and boisterous when she confronted the son of the drugstore owner, who was then a pharmacy intern, regarding the price of her medications. She expressed her belief that she was overcharged by fifty cents, and she objected when the intern, following the pharmacy's normal procedure, opened the pill container to verify and show her the contents. She claimed that, because he opened the container, the pills became dirty, and she insisted that he replace them. She left after a brief outburst but returned twenty minutes later and asked the owner for the intern's and his names. The owner gave her his name but refused to give his son's. During her second visit, Raven continued to be loud and belligerent. The police responded to the owner's call and removed Raven from the drug store.

¶3 The State charged Raven with disorderly conduct. Between the filing of the complaint and the trial, Raven had three successive attorneys appointed to represent her, but she discharged all three. Proceeding pro se, Raven then moved to waive her right to a jury trial. At the hearing on this motion, the

following exchange took place when Raven responded to the court with her reasons for foregoing a jury trial:

> Raven: … I just wouldn't feel confident with a jury, twelve-member jury of all white people. I don't mean to be prejudice sounding, but I just couldn't feel comfortable.
>
> The Court: Well if it makes any difference to you, Ms. Raven, I have had trials in this Court since I have been a circuit court judge with American Indians, with African Americans. I find our jurors are not prejudiced. I recognize that you play that card frequently, and I'm disappointed, but if you have more confidence in me hearing the case rather than a jury, I will grant you your motion.

¶4 Three witnesses—the owner of the store, his son and a pharmacy technician—testified for the State at the bench trial about the incident. During her own testimony, Raven said that, after she confronted the intern about the price of her medicine, she went home to pick up a tape recorder that she usually carries with her.[2] The court found Raven guilty of disorderly conduct and proceeded to sentencing.

¶5 The State made what it called a "unique" recommendation, asking the court to postpone the sentencing hearing for thirteen months instead of imposing a fine or jail sentence. If Raven made arrangements to fill her prescriptions elsewhere and refrained from visiting Sharrow Drugs during that time, the State would then ask for only court costs. Although the court was inclined to grant the State's request, Raven stated she would rather be placed on

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[2] In a "History" of the case that Raven submitted with a pre-trial motion to dismiss, she explains that "I usually carry a tape-recorder with me because these type of things happen to me all the time here & the police never want to take my word for what happened."

probation. The court then withheld sentence and placed Raven on probation for eighteen months, with a condition that she "not go on the premises … of Sharrow Drug[s]."

¶6 Raven filed several postconviction motions seeking to vacate the judgment, to introduce a tape recording of a portion of the incident at the drug store and to correct the alleged inaccuracy of the transcript of the pre-trial hearing on her jury trial waiver. The court denied these motions and Raven appeals.

ANALYSIS

¶7 The first issue Raven raises is the asserted ineffective assistance rendered by the three attorneys who represented her prior to trial. This issue is not properly before us, however, because Raven failed to make the ineffective assistance of counsel claim in the circuit court. Thus, none of the three attorneys have testified regarding Raven's allegations at a ***Machner*** hearing. *See* ***State v. Machner***, 92 Wis. 2d 797, 803-04, 285 N.W.2d 905 (Ct. App. 1979). We therefore cannot address the merits of her claims that these attorneys performed deficiently. *See* ***id***. at 804.

¶8 Next, Raven challenges the accuracy of a portion of the transcript of the hearing on Raven's motion to waive a jury trial. Raven frames the issue as "misconduct of judge [and] court reporter." In her "Motion to Enlarge [Time]" filed after trial, Raven stated her belief that the court, in response to her comment that she had little trust in the impartiality of a prospective all-white jury, said: "I think you're playing *the race card* – [and] I understand you do that quite often" (emphasis added). At the hearing on Raven's post-judgment motions, the circuit court judge explained that although he did say, as the transcript reflects, "that card" and not "the race card," he in fact meant to convey that Raven had made

claims of racial bias in past court proceedings generally, and before him in particular. The judge recalled a hearing involving a local grocery store, during which Raven asserted that she was uncomfortable "dealing with the court system and, basically, people that are white." Raven stated that she "remember[ed] that case."

¶9 The circuit court concluded the transcript was accurate and denied Raven's motion to change it. We will not disturb the circuit court's finding regarding the accuracy of the existing transcript because we cannot conclude on the present record that the finding is clearly erroneous. *Cf.* ***State v. DeLeon***, 127 Wis. 2d 74, 82, 377 N.W.2d 635 (Ct. App. 1985) (explaining that a trial court's findings of fact in a proceeding to reconstruct a transcript when a reporter's notes are unavailable is reviewed under the clearly erroneous standard). The record contains only Raven's assertion that the transcript is inaccurate. The judge who denied Raven's post-conviction motion to correct the transcript also presided at the transcribed hearing, and it was the judge's own words that Raven claims were wrongly reported. The court based its ruling that the transcript was accurate on its own recollection of what it had said, and its ruling is thus essentially unreviewable on appeal.

¶10 Moreover, we note that Raven conceded at the post-trial hearing that she was "not saying it [the asserted inaccuracy] affected the outcome of the trial." Thus, even if Raven's recollection of what the court said at the jury-waiver hearing were correct, her "substantial rights" in the litigation were not affected and any error in the court's ruling would not provide a basis for reversal. *See* WIS. STAT. § 805.18(2); *see also* ***DeLeon***, 127 Wis. 2d at 80 ("Obviously, the trial court need not conduct an inquiry if the appellant has no intention of alleging error in the missing portion of the proceedings.").

¶11 The third claim of error Raven asserts relates to an audio recording she claims to have made of the second part of the incident at the drug store. Raven contends that she twice attempted to introduce the tape recording in the course of the proceedings and was denied both times. The record does not support this contention, however. Raven first mentioned the existence of the tape in her pre-trial "Motion to Dismiss False Charges," where she asserted that "[o]nce heard, the Court will have no doubt whatsoever that this tape is genuine [and] un-tampered with!" The circuit court denied Raven's motion to dismiss because the motion essentially challenged the truthfulness of the State's witnesses, which the court noted was "a factual dispute," and "[t]hat's what a trial is for." We concur in the court's assessment and denial of the motion, and we note that the motion sought dismissal of the complaint, not the introduction of the tape as evidence at the impending trial.

¶12 Raven testified at trial that she left the store briefly to get her tape recorder and that she had a recording of what took place after she returned to the drug store. She did not, however, move to introduce the tape into evidence. Following her conviction, Raven filed a "Motion to Vacate, Suppress, [and] Hear Tape Evidence" in which she "move[d] the Court to hear for itself that the witnesses lied," referring to her tape recording. The court denied what it deemed to be Raven's request to re-open the case to listen to the tape recording that was not offered as evidence at trial.

¶13 We conclude the circuit court did not err in denying Raven's belated motion to proffer the tape as evidence. We first note that, under WIS. STAT. § 901.03(1), a party may not assert error on appeal in the exclusion of evidence unless it was the subject of a timely proffer and, if necessary, an offer of proof. Moreover, the tape plainly is not "newly discovered evidence," inasmuch as it was

apparently in Raven's possession as early as the date of the incident at the drug store. *See* ***State v. Morse***, 2005 WI App 223, ¶¶14-15, __ Wis. 2d __, 706 N.W.2d 152.[3]

¶14 Raven's final challenge is to the sufficiency of the evidence to convict her of disorderly conduct. She maintains that the owner of the drug store "verbally assaulted, abused [and] insulted" her; that her anger was thus "instigated" by him; and, therefore, her behavior did not constitute disorderly conduct. The State urges us to affirm the conviction, relying on the largely consistent testimony of its three witnesses at trial.

¶15 We will not reverse a conviction "unless the evidence, viewed most favorably to the State and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." *See* ***State v. Schwebke***, 2002 WI 55, ¶40, 253 Wis. 2d 1, 644 N.W.2d 666 (quoting ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990)). The circuit court was the ultimate arbiter of witness credibility in the bench trial conducted in this case, and the court accepted the testimony of the drug store employees as to what had occurred on the day in question. On appeal, unless we conclude the testimony of the three drug store employees was inherently incredible as a matter of law, we, too, are bound to accept that testimony because the trial court deemed it credible. *See* ***State v.***

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[3] A defendant seeking a new trial on the basis of newly discovered evidence must show, among other things, that the evidence was first discovered after trial. ***Morse***, 706 N.W.2d 152, ¶15.

Chacon, 50 Wis. 2d 73, 75, 183 N.W.2d 84 (1971).[4] Thus, our only task is to determine "whether the trial court acting reasonably could be convinced beyond a reasonable doubt by the evidence it thought credible." ***Id.*** at 75-76. We are so convinced.

¶16 The State's burden was to prove the following elements of disorderly conduct under WIS. STAT. § 947.01: (1) Raven, in a private or public place, engaged in violent, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly conduct, (2) under circumstances that tended to cause or provoke a disturbance. *See* WIS. STAT. § 947.01; ***Schwebke***, 253 Wis. 2d 1, ¶41.

¶17 The incident took place in a public place, a drug store, in the presence of several customers and employees of the drug store. The store's owner knew Raven because she was a regular customer of the drug store and had a history of engaging in disputes with drug store employees. The owner came to the aid of the pharmacy technician when Raven confronted her about being overcharged for her prescription. The owner testified that Raven appeared to be "upset," and that she exhibited a "[r]aised voice, anger in her eyes, anger in her face; loud, loud, loud behavior and—and behavior that was unacceptable to [him]." The incident attracted the attention of several customers. Raven then left for about twenty minutes, returning to demand that the owner tell her the name of the intern who had waited on her. She "was still upset" at that time and exhibited

[4] *See* ***Rohl v. State***, 65 Wis. 2d 683, 695, 223 N.W.2d 567 (1974) (We cannot conclude that evidence is incredible as a matter of law unless it is "'in conflict with the uniform course of nature or with fully established or conceded facts.'") The testimony of the State's witnesses suffers from neither infirmity.

"unprofessional, obnoxious behavior." The owner asked her to leave, but she refused. His impression was that "[t]here was some agenda that she wanted to accomplish, and … that meant creating a scene…." The owner called the police. Two officers arrived within ten minutes and removed Raven from the store. The testimony of the pharmacy technician and intern basically corroborated the owner's recollection of the incident.

¶18 We conclude that the circuit court could have reasonably determined from the foregoing testimony that the State had proved beyond a reasonable doubt that Raven had been "boisterous [and] unreasonably loud" in a public place, and that her conduct tended to cause a disturbance. *See* WIS. STAT. § 947.01. The evidence was thus sufficient to support Raven's conviction for disorderly conduct. Accordingly, we affirm the conviction.

CONCLUSION

¶19 For the reasons discussed above, we affirm the appealed judgment.

By the Court.—Judgment affirmed.

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