COURT OF APPEALS
DECISION
DATED AND FILED

May 22, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP2874-CR **Cir. Ct. No. 2005CM6271**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES LAWHORN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: PAUL R. VAN GRUNSVEN, Judge. *Affirmed*.

¶1 KESSLER, J.[1] James Lawhorn appeals from a judgment of conviction for one count of graffiti, in violation of WIS. STAT. § 943.017(1) (2005-

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2005-06).

06).[2] Lawhorn contends that there was insufficient evidence presented to prove elements three and five of § 943.017(1) beyond a reasonable doubt. We conclude that there was sufficient evidence presented such that a trier of fact could have found that the State had proven, beyond a reasonable doubt, that Lawhorn's conduct met all of the elements of § 943.017(1); therefore, we affirm.

BACKGROUND

¶2 At approximately 6:10 p.m. on August 10, 2005, Lawhorn was arrested for graffiti (mark, draw or write) on the underpass of the City of Milwaukee bridge located at 1335 East Locust Street (Locust Street bridge). Prior to his arrest, officers discovered Lawhorn with a spray can of black paint, black paint on his hands and fresh black paint on a bridge column. Lawhorn dropped the spray can when the officers approached him. He told police that he did not know that it was illegal to graffiti the underpass of this particular bridge. After his arrest, Lawhorn was transported to the Fifth District police station where he was placed in an eight-by-five foot cell with only a concrete slab to sit on (with no bed, blanket, pillow or toilet) and questioned on two to three occasions by a police officer who identified himself as a member of the District's graffiti unit. At approximately 4:00 a.m. or 5:00 a.m., Lawhorn was transported to the First District police station where he was placed in a holding cell. At approximately 1:45 p.m., Lawhorn was questioned by another police officer regarding the incident that led to his arrest. In the approximately ten to twelve hours from his arrest to his being taken to the First District police station, Lawhorn had been

[2] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

given only water, was provided with no food and was not able to sleep. After being transported, Lawhorn was only able to sleep for approximately two to three hours and received some food to eat. Lawhorn was then questioned on the early afternoon of August 11 regarding the incident which led to his arrest the evening before. During this questioning, Lawhorn was provided with a bottle of Mountain Dew and a bathroom break. During this questioning, Lawhorn gave a statement; however, after a ***Miranda-Goodchild*** hearing, the trial court suppressed the statement as not voluntary.

¶3 A trial to the court was held. During the trial, an arresting officer, an inspector from the City of Milwaukee Department of Neighborhood Services (DNS), the defense's private investigator and Lawhorn all testified.

¶4 Lawhorn was found guilty of graffiti and sentenced to six months of probation (stayed) and eighty hours of community service with the City of Milwaukee's Anti-Graffiti Program. The judgment also specifically noted that if Lawhorn successfully completed probation and there were no additional charges, he could apply to have this conviction expunged. Lawhorn appealed his conviction. Additional facts will be provided as needed.

DISCUSSION

¶5 When reviewing whether the evidence presented at trial was sufficient to sustain a finding of guilt, our supreme court has stated:

> [A]n appellate court may 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.

State v. Poellinger, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). The test is not whether this court is convinced of the appellant's guilt beyond a reasonable doubt, but "whether this court can conclude that the trier of fact could, acting reasonably, be so convinced by evidence it had a right to believe and accept as true." ***State v. Searcy***, 2006 WI App 8, ¶22, 288 Wis. 2d 804, 709 N.W.2d 497 (citing ***Poellinger***, 153 Wis. 2d at 503-04); ***Poellinger***, 153 Wis. 2d at 503 (it is the function of the trier of fact "to decide which evidence is credible and which is not and how conflicts in the evidence are to be resolved"). Sufficiency of evidence claims are reviewed in the light most favorable to the findings of the trier of fact. *See* ***State v. Toy***, 125 Wis. 2d 216, 222, 371 N.W.2d 386 (Ct. App. 1985).

¶6 Assessing the credibility of a witness is properly the function of the trier of fact. ***State v. Curiel***, 227 Wis. 2d 389, 420, 597 N.W.2d 697 (1999). Only when the evidence that the trier of fact relied upon is "inherently or patently incredible" may an appellate court substitute its own judgment for that of the trier of fact. ***Id.*** To be inherently or patently incredible, testimony must be in "conflict [] with nature or fully established or conceded facts." ***Id.*** (citation omitted); ***State v. Clark***, 87 Wis. 2d 804, 816, 275 N.W.2d 715 (1979); *see also* ***Ruiz v. State***, 75 Wis. 2d 230, 232, 249 N.W.2d 277 (1977) ("Even though there be glaring discrepancies in the testimony of a witness at trial … that fact in itself does not result in concluding as a matter of law that the witness is wholly incredible."). In addition, if there is any possibility that the trier of fact could, from the evidence presented, be convinced that the defendant is guilty, then "an appellate court may

not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it." ***Poellinger***, 153 Wis. 2d at 507.

¶7 Lawhorn argues that the State has failed to prove, beyond a reasonable doubt, elements three and five of WIS. STAT. § 943.017.[3] WISCONSIN JI-CRIMINAL 1403 sets forth the five elements the State must prove beyond a reasonable doubt.[4] Lawhorn further argues that because the City of Milwaukee has not expeditiously abated the graffiti that was illegally painted on the columns and other concrete structures under the Locust Street bridge, the City has

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[3] WISCONSIN STAT. § 943.017, entitled "Graffiti," states, in pertinent part:

> **(1)** Whoever intentionally marks, draws or writes with paint, ink or another substance on or intentionally etches into the physical property of another without the other person's consent is guilty of a Class A misdemeanor….

[4] WISCONSIN JI—CRIMINAL 1403, **GRAFFITI — § 943.017**, states, in pertinent part:

> **Elements of the Crime That the State Must Prove**
>
> 1. The defendant (marked) (drew) (wrote) with paint, ink or another substance on physical property.
>
> 2. The physical property belonged to another person. [City of Milwaukee is a person for purposes of this element.]
>
> 3. The defendant (marked) (drew) (wrote) on the property without the consent of [the City of Milwaukee].
>
> 4. The defendant acted intentionally. The term "intentionally" means that the defendant must have had the mental purpose to (mark) (draw) (write) on the property.
>
> 5. The defendant knew the property belonged to another person and knew that the other person did not consent to (marking) (drawing) (writing) on the property.

(Footnotes omitted.)

impliedly consented to having individuals continue to graffiti this area. The State argues that the delay in abatement, as testified to by an inspector of the City's DNS, is strictly a matter of allocating scarce resources, and "was not meant by the city in any way to promote any commission of graffiti."

¶8 At the conclusion of the trial to the court, the trial court set forth the following findings as the trier of fact. As to the three elements not being contested on appeal, the trial court found that the State had proven them beyond a reasonable doubt.[5] As to the two elements whose findings are being appealed in this case, and which relate to consent, regarding the third element, that Lawhorn marked,

[5] As to element one, the trial court found that Officer Ronald Villagomez (one of the arresting officers) testified that he saw Lawhorn spray painting the bridge columns and that Lawhorn himself testified that, "I was spray painting the pillars and concrete drainage structure." Based upon this evidence, the trial court found that "this element has been proven beyond a reasonable doubt." As to element two, that the property belonged to someone other than Lawhorn, the trial court found credible both the testimony of the DNS inspector that the subject structures were owned by the City of Milwaukee, and Lawhorn's testimony that he knew the structures were owned by someone other than himself and, accordingly, found that "this element was proven by the State." Finally, as to element four, that Lawhorn acted intentionally, the trial court noted the following:

> The term intentionally means the defendant must have had the mental purpose to mark, draw, write on the property. Again, I go back to the finding of what was the testimony of Officer Villagomez, who said he saw the defendant spray painting the pillars. He testified this wasn't accidental, this is from his testimony, the direct evidence, and the reasonable inference from that evidence to support a finding that the defendant intentionally acted in this instance.
>
> Furthermore, I'm struck by the -- and note the testimony of the defendant himself, wherein he admitted on cross-examination, I know I am not supposed to do this, I went down there intentionally to make my mark.
>
> Based on all of the evidence and this element, I find that the State has proven beyond a reasonable doubt that the defendant acted intentionally.

drew and/or wrote on the property without the consent of the owner, the trial court specifically found:

> The third element requires the State demonstrate beyond a reasonable doubt that the defendant marked, drew, wrote on the property without the consent of the owner.
>
> In this case[,] it is established that the pillars and the drainage structure on which the defendant was painting were owned by the City of Milwaukee.
>
> Ms. Blando [the DNS witness] testified as part of the State's case in chief that the city does not consent to any graffiti on city property.
>
> On rebuttal[,] Ms. Blando testified further as to the public relations efforts made by the city to inform the public that graffiti on any property would not be tolerated by the city.
>
> As such I find that the State has proven beyond a reasonable doubt that the defendant did mark, draw or write on the property without the consent of the city which owned the property at issue now before the Court.

Finally, as to element five, the trial court found:

> The fifth element requires that the State prove beyond a reasonable doubt that the defendant knew the property belonged to another person and knew that the other person did not consent to marking, drawing or writing on the property.
>
> In this regard[,] I note the following testimony, and in addition to that previously highlighted in this regard.
>
> The defendant testified in this case as to the following:
>
> The defendant testified that he thought it was okay to graffiti or make these marks because there was so much graffiti in the area in which he was found to have been allegedly committing this offense. He admitted he knew the property on which he was marking belonged to someone else, and he also admitted, as I stated previously, he went down there to intentionally make his mark.

> Furthermore, on cross-examination the defendant testified as to graffiti'ing places, I know I am not supposed to.
>
> The defendant testified when confronted by police officers, and made contact with police officers, he told the officers he didn't know it was illegal, in other words, his marks and graffiti, because of all the graffiti that had been there for years.
>
> Given the circumstances and the substantial amount of graffiti, the essential defense in this case is one of implied consent.
>
> That under the circumstances, with the sheer amount of graffiti, the defendant was led to believe that there was consent to making the graffiti in the area that he did.
>
> As to this element, I find that the State has proven beyond a reasonable doubt that the defendant knew the property belonged to another person, and knew that that person did not consent to marking, drawing or writing on the property.
>
> First of all, when the police officers came upon the scene and confronted the defendant, there was testimony that the defendant drop[ped] the spray can.
>
> The fact that there was a substantial amount of graffiti does not in my mind create an element of implied consent.
>
> Wisconsin courts have stated that consent -- Wisconsin courts have stated that "consent may be implied from the conduct of the owner, from the relationship of the parties or by custom. Likewise, consent may be implied from custom or when the owner's conduct is such as would warrant a reasonable person, having knowledge thereof, to believe that the owner had given consent to come upon the premises."[6]

[6] Regarding consent, the trial court noted that it was citing to ***Fandrey v. American Family Mutual Insurance Co.***, 2004 WI 62, ¶36, n.13, 272 Wis. 2d 46, 680 N.W.2d 345. ***Fandrey*** states:

(continued)

> ….
>
> Citing the case as noted, the argument essentially is because of the sheer amount of graffiti, this defendant was led to believe that the city did not object to marking on the property, that there was implied consent.
>
> I'm not going to find that that has been proven in this instance.
>
> I find that the State has proven beyond a reasonable doubt that the City did not consent. I do not find a basis under all the facts and circumstances now before the Court for the implied consent defense which apparently is being offered in this case.
>
> ….
>
> While the city might have been very aggressive in cleaning the graffiti and removing the graffiti, I don't think that the specific argument can be made that under the circumstances, individuals like the defendant were free to go down and continue marking the area.
>
> The absence of cleanup, the sheer amount of the graffiti, while troublesome, does not convince me there was consent on the part of the owner of the property to the graffiti that was made by the defendant under the circumstances.

> "[C]onsent may be implied from the conduct of the owner, from the relationship of the parties, or by custom." *Baumgart v. Spierings*, 2 Wis. 2d 289, 293, 86 N.W.2d 413 (1957). Likewise, "consent … may be implied from custom, or when the owner's conduct is such as would warrant a reasonable person having knowledge thereof to believe that the owner had given consent to come upon the premises." *Verdoljak v. Mosinee Paper Corp.*, 192 Wis. 2d 235, 243, 531 N.W.2d 341 (Ct. App. 1995). Thus, the landowner's knowledge of another entering his land and his resulting behavior is a key factor in determining implied consent. *See also Baumgart*, 2 Wis. 2d at 294 (finding implied consent where landowner knew children would play on his property and never warned them to leave or stay off of his land).

Fandrey, 272 Wis. 2d 46, ¶36 n.13.

> Furthermore, I am struck by the Wisconsin Courts, Court of Appeals[’] treatment of consent and implied consent. I don’t believe this case fits within those circumstances.
>
> The evidence on a whole, and reasonable inference therefrom, convince me that the State has proven element five beyond a reasonable doubt.

(Footnote added.)

¶9 As noted above, we review whether the trier of fact had sufficient evidence upon which to base its findings. *See* ***Searcy***, 288 Wis. 2d 804, ¶22. Lawhorn cites to ***Verdoljak v. Mosinee Paper Corp.***, 192 Wis. 2d 235, 531 N.W.2d 341 (Ct. App. 1995), a trespass case, as support for his claim that the City of Milwaukee impliedly consented to individuals graffiti’ing the columns and drainage structures under the Locust Street bridge. The court in ***Verdoljak*** held that consent “may be implied from custom, or when the owner’s conduct is such as would warrant a reasonable person having knowledge thereof to believe that the owner had given consent.” ***Id.*** at 243. The trial court, in considering whether the actions of the City demonstrated an implied consent to allow graffiti to these portions of the Locust Street bridge, cited ***Fandrey v. American Family Mutual Insurance Co.***, 2004 WI 62, ¶36 n.13, 272 Wis. 2d 46, 680 N.W.2d 345, also a trespass case, which itself quoted the ***Verdoljak*** court and further quoted from the supreme court case of ***Baumgart v. Spierings***, 2 Wis. 2d 289, 293, 86 N.W.2d 413 (1957), a third trespass case, noting: “consent may be implied from the conduct of the owner, from the relationship of the parties, or by custom.”

¶10 The trial court found that both the testimony of the DNS inspector and Lawhorn established that the City did not consent to the commission of graffiti on any City property. The inspector testified that while abatement schedules were not always optimal and that accessibility was one factor which

made some abatement more difficult and therefore the graffiti remained longer than preferred by the City, the City was very aggressive in its promotion of its anti-graffiti public information campaign. Lawhorn testified that he knew that graffiti was generally unlawful, admitting that he did not tell and would not have told his parents that he was going down to graffiti the Locust Street bridge columns. Lawhorn also testified that he stopped his spray painting upon seeing the police officers approach. Additionally, during cross-examination, Lawhorn admitted that while he saw no sign specifically informing him that graffiti was prohibited under the Locust Street bridge, Lawhorn acknowledged that he did not need a sign in a store telling him that shoplifting was prohibited to know that shoplifting was illegal.

¶11 Implicit in determining whether consent can be implied is whether the conduct or custom "'would warrant a reasonable person having knowledge thereof'" to believe that consent had been given. ***Fandrey***, 272 Wis. 2d 46, ¶36 n.13 (quoting ***Verdoljak***, 192 Wis. 2d at 243). Here, the actions of the City through its anti-graffiti public information campaigns and its graffiti abatement program implemented through the DNS demonstrate that a reasonable person would believe that the City did not consent to the graffiti'ing of any of its property, regardless of the time and allocation of resources utilized by the City to abate the graffiti underneath the Locust Street bridge. Additionally, while Lawhorn may have commented to the police that he thought it was "okay" to spray paint in this particular area, his actions demonstrated that he knew what he was doing was not with the consent of the owner of the property, *i.e.*, the City of Milwaukee.

¶12 Lawhorn also attempts to attack the credibility of the DNS inspector's testimony, noting that the inspector could not give specific information

as to when the graffiti had last been removed from the columns and drainage structures under the Locust Street bridge, and that a signed victim impact statement which she provided regarding the cost of the abatement of Lawhorn's graffiti was inaccurate. While the record shows that the testimony of the DNS inspector was not entirely consistent regarding how properties owned by the City of Milwaukee were scheduled for graffiti abatement, the inspector's testimony was clear that at no time did the City ever consent to the graffiti of its property, that the City's inability to clean all of the graffiti from all of the structures that it owns in no way should be considered an abandonment of those structures nor consent that an otherwise unlawful activity is lawful just because of the City's inability to keep up with abatement schedules and that, in fact, the City annually undertakes a massive anti-graffiti public information campaign which specifically discusses the illegality of graffiti, including on City-owned property.[7] As to the victim impact statement, the DNS inspector ultimately testified that the cost to the City that may

[7] The DNS inspector specifically testified (with no cross-examination by defense counsel), in response to the question "what efforts does the city take to publicize the fact that graffiti is wrong and they don't consent to graffiti?" as follows:

> There are many different ways we do it. We advertise on Channel 25 on programs such as Inside Milwaukee through the little media flashers that do cross-ads on Channel 25. There is the televised anti-graffiti policy committee that meets every other month stating the city's position on graffiti, showing that it's wrong, telling you that you should call the anti-graffiti hotline.
>
> We have brochures. We speak to school students, to youths. We have events annually where we have schools do anti-graffiti projects and events that we host and display in city hall for two weeks.
>
> We have educational presentations, not just to the youths, but also to community groups, business groups, where the message is put out into the community.

not yet have been charged, but otherwise the amount listed for restitution for the graffiti was correct.[8]

¶13 While Lawhorn seeks to characterize the DNS inspector as a "liar" because the inspector's testimony was inconsistent regarding the exact timing of the clean up of the columns and drainage structures under the Locust Street bridge, as well as because of the victim impact statement regarding the cost of abatement, as noted above, it is the trier of fact who is the ultimate judge of the credibility of the witnesses. Here, the trial court, as the trier of fact, found that the City did not consent based upon the testimony of the DNS witness. Based upon our independent review of the record, we conclude that the evidence is sufficient to support the trial court's findings, as the trier of fact, that the State has proven beyond a reasonable doubt that the City did not, expressly or impliedly, consent to Lawhorn's graffiti of the columns and drainage structures under the Locust Street bridge. Additionally, we conclude that the trial court could find, based upon the evidence presented at trial, that Lawhorn demonstrated, through his actions upon being discovered by police officers, that he knew that the City did not consent to graffiti'ing of the columns and drainage structures under the Locust Street bridge. Accordingly, we affirm.

By the Court.—Judgment affirmed.

[8] The DNS submitted a signed victim impact statement that the cost of abatement of the graffiti at issue is $1000. Upon cross-examination, and noting that the graffiti is still present on the subject columns and drainage structures under the Locust Street bridge, the DNS inspector acknowledged that "I don't know if it's [the "$1000] been expended at this time," and further testified that "the cost is not just to abatement charges. We look for restitution for all the costs that are incurred, the cost of the police being there, the time spent by the police department, the data entry by any clerks for information … including use of vehicles, gasoline…."

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