

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 3, 2007

David R. Schanker
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. 2006AP2659-CR

Cir. Ct. No. 2006CM964

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

MARK A. VANEPEREN,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Outagamie County:
MARK J. MCGINNIS, Judge. *Reversed and cause remanded for further proceedings.*

¶1 PETERSON, J.¹ The State of Wisconsin appeals an order dismissing its complaint against Mark VanEperen. The circuit court concluded the

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

complaint did not show probable cause to believe that VanEperen had committed a crime. In the alternative, the court concluded the complaint should be dismissed because the complaint would not have shown probable cause had all of the material facts been included.

¶2 VanEperen has not filed a response brief. Failure to file a response brief is a tacit concession the circuit court erred. *State v. R.R.R.*, 166 Wis. 2d 306, 311, 479 N.W.2d 237 (Ct. App. 1991). In this case, VanEperen’s concession was correct.

¶3 The criminal complaint charged VanEperen with misdemeanor disorderly conduct as an act of domestic abuse in violation of WIS. STAT. §§ 947.01 and 968.075. To prove the charge, the State had the burden of proving that:

- (1) VanEperen engaged in “violent, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly conduct.” WIS. STAT. § 947.01.
- (2) VanEperen’s conduct took place under “circumstances in which the conduct tends to cause or provoke a disturbance.” WIS. STAT. § 947.01.
- (3) VanEperen engaged in a physical act that caused his spouse² to reasonably fear infliction of pain, physical injury, or illness, impairment of physical condition, or sexual assault. WIS. STAT. § 968.075(1).

¶4 The criminal complaint alleged the following facts:

² Domestic abuse can also be committed against a former spouse, a person who shares the defendant’s residence, or a person with whom the defendant shares a child. WIS. STAT. § 968.075(1)(a).

- (1) An officer was dispatched to VanEperen's residence to respond to an alleged domestic disturbance.
- (2) Gail VanEperen told the officer she and her husband Mark VanEperen lived there.
- (3) Gail told the officer she and VanEperen had argued and VanEperen was intoxicated and became "verbally abusive."
- (4) Gail said as the argument progressed she began "to fear for her safety" as VanEperen "was more and more upset."
- (5) When VanEperen was interviewed several days later, he told the officer he had become "irritated, mad and began to yell and lost control."

The State later amended the complaint to include additional facts regarding past domestic disputes and more details of the altercation.

¶5 Whether a complaint shows probable cause is a question of law reviewed without deference to the circuit court. *State v. Reed*, 2004 WI App 98, ¶4, 273 Wis. 2d 661, 681 N.W.2d 568, *aff'd*, 2005 WI 53, 280 Wis. 2d 68, 695 N.W.2d 315. On appeal, the only question is whether the "four corners" of the complaint show probable cause—that is, whether the facts in the complaint show that it is probable that a crime was committed and the defendant committed it. *State v. Adams*, 152 Wis. 2d 68, 73, 447 N.W.2d 90 (Ct. App. 1989).

¶6 Gail's statement that VanEperen became verbally abusive, coupled with VanEperen's admission that he "began to yell and lost control" states probable cause to believe VanEperen engaged in "abusive" and "unreasonably loud" conduct. Gail's statement that she feared for her safety and VanEperen's admission that he "lost control" shows VanEperen's conduct tended to cause a disturbance. Those facts also show probable cause to believe Gail reasonably feared that VanEperen would physically injure her. The complaint therefore

showed probable cause to believe VanEperen committed disorderly conduct as an act of domestic abuse.

¶7 In the alternative, the circuit court concluded the totality of the facts in the police reports and other evidence did not show probable cause, and granted VanEperen’s *Franks/Mann*³ motion. Under *Mann*, a defendant may challenge a complaint that omits “critical material” that “is necessary for an impartial judge to fairly determine probable cause.” *State v. Mann*, 123 Wis. 2d 375, 385-86, 367 N.W.2d 209 (1985) The complaint is to be dismissed only if: (1) the complaint omits an “undisputed fact that is critical to an impartial judge’s fair determination of probable cause”; and (2) had the omitted fact been included, the complaint would no longer show probable cause. *Id.* at 388-89.

¶8 VanEperen’s motion stated four omitted facts:

- (1) The police had originally been called to VanEperen’s house because his daughter was missing;
- (2) When the officer arrived, Gail told the officer there was no need for an officer because the daughter had returned home;
- (3) Gail sent the children downstairs so they would not be near the argument taking place; and
- (4) VanEperen left the house when Gail asked him to and gave her money before he left.

¶9 None of these facts is an “undisputed fact that is critical to an impartial judge’s fair determination of probable cause.” *See id.* at 388. The first two facts deal with the reason for the initial call and Gail’s initial reaction. Those

³ *See Franks v. Delaware*, 438 U.S. 154 (1978); *State v. Mann*, 123 Wis. 2d 375, 367 N.W.2d 209 (1985).

facts are relevant as background but shed little light on the alleged crime itself. The third fact—that the children were sent downstairs—cuts both ways. That is, one could infer that because the children were downstairs, a disturbance was less likely. One could also infer, however, that Gail sent the children downstairs because VanEperen was engaging in increasingly loud and abusive conduct. The final fact is minimally relevant because it involves VanEperen’s conduct after the altercation had concluded. The disorderly conduct charge stems from his conduct during the altercation itself.

¶10 The circuit court based its conclusion on the fact that VanEperen made the right decision when he eventually left the house to cool down without engaging in any physical violence or getting the children involved. However, VanEperen’s conduct after the dispute was over does not mean that his conduct during the dispute was in conformity with the law.

By the Court.—Order reversed and cause remanded for further proceedings.

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

