

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 15, 2008

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. 2008AP672

Cir. Ct. No. 2007CV1065

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

CITY OF BROOKFIELD,

PLAINTIFF-RESPONDENT,

V.

MICHAEL C. LOPORCHIO,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Waukesha County:
LEE S. DREYFUS, JR., Judge. *Affirmed.*

¶1 ANDERSON, P.J.¹ Michael C. Loporchio appeals from an order determining that a restaurant he managed, T.G.I. Friday's, unlawfully sold alcohol

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

to a minor in violation of CITY OF BROOKFIELD, WIS., ORDINANCE § 5.24.11(a). At trial, the City of Brookfield presented sufficient evidence that alcohol was served to a minor at T.G.I. Friday's. We affirm.

¶2 Loporchio was the manager and liquor license holder of T.G.I. Friday's in Brookfield, Wisconsin, on February 7, 2006. On February 7, 2006, the City of Brookfield Police Department responded to the call of a disorderly female in the parking lot of T.G.I. Friday's. Upon investigation, the disorderly female identified herself as Nicole Adamek. Adamek informed police that she was under the age of twenty-one and had been drinking at T.G.I. Friday's.

¶3 Further investigation revealed that Adamek was served alcohol by Kevin Kreilkamp, a T.G.I. Friday's bartender. Kreilkamp informed the investigating officers that he did not ask Adamek for identification prior to serving her. Kreilkamp also indicated that he did not know Adamek's age.

¶4 The circuit court conducted a bench trial on January 23, 2007. Two City of Brookfield police officers testified to the above events at trial. Loporchio argued that WIS. STAT. §125.07(6)(a)–(d) provided him with a defense because Kreilkamp served Adamek in “good faith.” Loporchio produced a single witness, Beth Geboy, a T.G.I. Friday's bartender, who testified about prior occasions involving Adamek being served alcohol at T.G.I. Friday's. Geboy also testified about T.G.I. Friday's general serving policies. Additionally, Geboy stated that Adamek was the girlfriend of a co-worker and Loporchio's brother-in-law, Mike Hotz.

¶5 Holding that Geboy could not testify about Kreilkamp's state of mind on the night in question, the circuit court rejected Loporchio's defense because Kreilkamp was not produced at trial. Loporchio appeals the order holding

him in violation of CITY OF BROOKFIELD, WIS., ORDINANCE § 5.24.11(a). Loporchio claims that the circuit court misconstrued evidence and erred in not finding a good faith defense.

¶6 The standard of review we apply when reviewing the factual findings of a circuit court is the clearly erroneous standard. *Noll v. Dimiceli's, Inc.*, 115 Wis. 2d 641, 643, 340 N.W.2d 575 (Ct. App. 1983). In *Noll*, the court stated that the clearly erroneous standard is essentially the same as the “great weight and clear preponderance” test. *Id.* The Wisconsin Supreme Court explained the application of this test, stating:

The evidence supporting the findings of the trial court need not itself constitute the great weight or clear preponderance of the evidence; nor is reversal required if there is evidence to support a contrary finding. Rather, to command a reversal, such evidence in support of a contrary finding must itself constitute the great weight and clear preponderance of the evidence.

Cogswell v. Robertshaw Controls Co., 87 Wis. 2d 243, 249-50, 274 N.W.2d 647 (1979). Furthermore, the *Cogswell* court stated that when evidence allows for more than a single reasonable inference, the inference drawn by the trial court must be accepted. *Id.* at 250.

¶7 Whether the evidence presented at trial was sufficient to fulfill a good faith defense is a mixed question of law and fact. When presented with a mixed question of law and fact, a court must find the relevant facts and determine if those facts fulfill a legal standard. *DOR v. Exxon Corp.*, 90 Wis. 2d 700, 713, 281 N.W.2d 94 (1979), *aff'd*, 447 U.S. 207 (1980). The standard of review for mixed questions of law and fact has two parts. First, we will apply the clearly erroneous standard to the facts. *Noll*, 115 Wis. 2d at 643. Second, we will address the legal conclusion de novo. *Exxon Corp.*, 90 Wis. 2d at 713. However,

we may give weight to the circuit court's legal conclusion if the legal conclusion and factual findings are significantly intertwined. *Leasefirst v. Hartford Rexall Drugs, Inc.*, 168 Wis. 2d 83, 89, 483 N.W.2d 585 (Ct. App. 1992).

¶8 In the present case, Loporchio argues that the circuit court committed errors of fact when it found that: (1) the record did not contain evidence that T.G.I. Friday's took proper steps to determine that Adamek was legally of age and (2) T.G.I. Friday's employees gave Adamek a "pass" because of her relationship with employee Hotz, who was also the manager's brother-in-law. Upon review, we must determine whether the great weight or clear preponderance of the evidence presented to the circuit court supports a finding contrary to that of the trial court.

¶9 Loporchio alleges that the circuit court erred in finding that T.G.I. Friday's did not take proper steps to determine Adamek's age. At trial, it was established that Adamek was underage and served alcohol by Kreilkamp on the night in question. Kreilkamp informed the police that he did not know Adamek's age. Additionally, Kreilkamp told an officer that he did not card Adamek on the night in question. To show that T.G.I. Friday's took the proper steps to determine that Adamek was legally of age, Loporchio produced a single witness, Geboy. Geboy testified that Adamek was a regular customer and had been carded on several prior occasions. Additionally, Geboy testified that Adamek had presented valid identification on prior occasions. Geboy also testified that T.G.I. Friday's servers treat regular customers as established adults. However, the circuit court did not allow Geboy's testimony to provide evidence of Kreilkamp's state of mind on the night in question.

¶10 Furthermore, Loporchio alleges that the circuit court made an unreasonable inference that T.G.I. Friday's employees gave Adamek a "pass" because of her relationship with an employee who was the manager's brother-in-law. Loporchio claims that there was no evidence from which this inference could be drawn. The record provides that Adamek was underage and served alcohol at T.G.I. Friday's. The record also indicates that Adamek was the girlfriend of a co-worker and Loporchio's brother-in-law, Hotz.

¶11 Loporchio also alleges that the circuit court erred in finding that there was insufficient evidence to support a finding of good faith service, a defense to the charged violation. The factual findings of the circuit court and the standard of review applied to those facts were discussed above; thus, we will now discuss the circuit court's conclusion of law.

¶12 Under Wisconsin statutory law, "[n]o person may procure for, sell, dispense or give away any alcohol beverages to any underage person not accompanied by his or her parent, guardian or spouse who has attained the legal drinking age." WIS. STAT. § 125.07(1)(a)(1). Section 125.07(6)(a)-(d) outlines four circumstances which may serve as a defense:

- (a) That the purchaser falsely represented that he or she had attained the legal drinking age.
- (b) That the appearance of the purchaser was such that an ordinary and prudent person would believe that the purchaser had attained the legal drinking age.
- (c) That the sale was made in good faith and in reliance on the representation and appearance of the purchaser in the belief that the purchaser had attained the legal drinking age.
- (d) That the underage person supported the representation under par. (a) with documentation that he or she had attained the legal drinking age.

According to § 125.07(6), the defendant has the burden of proving good faith service. Section 125.07(6) also provides that it is appropriate to consider all relevant circumstances surrounding the alleged violation.

¶13 Proof of every element is a complete defense. *City of Oshkosh v. Abitz*, 187 Wis. 2d 202, 206, 522 N.W.2d 258 (Ct. App. 1994). Furthermore, a defendant can produce evidence of any element or evidence of any other circumstances believed to be relevant. *Id.* Short of proof of all four elements, the trier of fact has discretion in declaring guilt. *Id.*

¶14 The circuit court concluded that Loporchio had not presented sufficient evidence to warrant the protection of the good faith defense. Additionally, the circuit court stated that its decision may have been different had Kreilkamp testified to the events of that night. However, without Kreilkamp's testimony the circuit court was unwilling to find Adamek was served in good faith on the night in question.

¶15 After reviewing the record, it was not error for the circuit court to find that the State carried its burden of proving a violation of CITY OF BROOKFIELD, WIS., ORDINANCE § 5.24.11(a). Additionally, the circuit court properly determined that there is no evidence warranting the finding of good faith service to Adamek. Therefore, we affirm the circuit court.

By the Court.—Order affirmed.

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

