COURT OF APPEALS
DECISION
DATED AND FILED

December 30, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP1880 **Cir. Ct. No. 2009FO19**

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

COLUMBIA COUNTY,

PLAINTIFF-RESPONDENT,

V.

JASON TYLER LOUNSBURY A/K/A JASON T. LOUNSBURY,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Columbia County: DANIEL S. GEORGE, Judge. *Affirmed*.

¶1 VERGERONT, J.[1] Jason Lounsbury appeals from the order finding him guilty of disorderly conduct, in violation of the Columbia County ordinance

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(b) and (3) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

adopting WIS. STAT. § 947.01, and imposing a forfeiture of $154.50. The primary issue on appeal is whether there was sufficient evidence for the court to find that he engaged in disorderly conduct. We conclude there was and we therefore affirm.

BACKGROUND

¶2 Lounsbury was cited for disorderly conduct after an altercation at a bar with John Twetten in which Lounsbury was injured. The trial was to the court. After hearing testimony from Lounsbury, Twetten, the bar manager on duty that night, the deputy sheriff who arrived at the scene, and a bar patron, and after viewing photographs and a videotape introduced by Lounsbury, the court determined that Lounsbury had engaged in disorderly conduct after the initial altercation.

DISCUSSION

¶3 When we review a challenge to the sufficiency of the evidence in a bench trial, we affirm unless the court's findings of fact are clearly erroneous. *See* WIS. STAT. § 805.17(2); *see also* ***Ozaukee County v. Flessas***, 140 Wis. 2d 122, 130-31, 409 N.W.2d 408 (Ct. App. 1987). The circuit court, not this court, determines the credibility of witnesses and resolves conflicts in the evidence. ***Global Steel Products Corp. v. Ecklund Carriers, Inc.***, 2002 WI App 91, ¶10, 253 Wis. 2d 588, 644 N.W.2d 269. We accept the inferences the circuit court draws from the evidence if they are reasonable, and we search the record for evidence that supports the findings of the circuit court, not for evidence that supports findings the circuit court did not make. ***Id.*** In reviewing the sufficiency of the evidence in this case, we employ the "clear, satisfactory, and convincing" burden of proof required for prosecution of civil ordinance violations that are also

crimes under state law. ***State v. Walberg***, 109 Wis. 2d 96, 102, 325 N.W.2d 687 (1982).

¶4 WISCONSIN STAT. § 947.01 provides that: "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 [disorderly conduct]."

¶5 The bar manager testified that she was in the kitchen when an argument occurred in the bar. She entered the bar area and saw that Lounsbury was "irate" at Twetten and she tried to get Lounsbury out of the bar. He was very angry, was using profane language, and was causing a disturbance for about twenty minutes until law enforcement arrived. She did not see the altercation itself that occurred between Lounsbury and Twetten. She testified that the rule of thumb is that after an argument, she has the most hostile party leave the bar, and on that night, that person was Lounsbury.

¶6 Twetten testified that Lounsbury was making comments about veterans that he found to be offensive, and he admitted that he struck Lounsbury to try to get him to stop talking about veterans, and then Lounsbury "came at" him. As a result of this incident, Twetten testified, he received a citation for disorderly conduct.

¶7 A patron at the bar testified as follows. He heard Lounsbury making comments about veterans and it escalated for the next two hours. After the altercation between Twetten and Lounsbury, the bar manager told Lounsbury to go outside, but the patron and another person had to hold Lounsbury in the vestibule because Lounsbury was kicking the door and trying to pinch the bar manager in

the door. Lounsbury's behavior disturbed him because he was "calling people out and wanting to fight" and was calling the bar manager "all sorts of, you know, bad names."

¶8 The deputy sheriff testified that when he arrived Lounsbury was standing outside of the bar. Lounsbury was visibly upset and was verbally aggressive toward him, but then calmed down. The officer also spoke to Twetten, who admitted assaulting Lounsbury and was then detained in the deputy's squad car. Lounsbury told the deputy he did not wish to pursue charges against Twetten, so no arrests were made, and both men left the scene.

¶9 Lounsbury testified that he was talking at the bar when he was punched from behind, knocked unconscious, and dragged from his chair. Lounsbury submitted two photographs of his injuries and a videotape without sound from the bar's surveillance camera.

¶10 In arriving at its conclusion, the circuit court stated that Lounsbury certainly had the right to express his opinions and it was not appropriate for Twetten to drag him out of his chair. The court found that Lounsbury was assaulted by Twetten in that Twetten removed him from his chair and pulled him away, and that Lounsbury sustained injuries. However, the court did not base its determination of disorderly conduct on that altercation. The court instead focused on Lounsbury's conduct after the initial altercation between Lounsbury and Twetten. The court assumed for the sake of argument that Lounsbury was injured as the result of a punch from Twetten and stated that Twetten might be guilty of battery and disorderly conduct. But the focus of this trial, the court said, was on whether Lounsbury engaged in disorderly conduct. Based on the videotape, which the court observed, and the witnesses' testimony, the court found that after the

initial confrontation, Lounsbury continued to be hostile and confrontational. He resisted when he was asked to leave, he was loud and boisterous, he was directing profanities toward the bar manager, and he was physically resistive when the bar manager was trying to get him to leave. The court found that this behavior contributed to a disturbance and was not justified by the altercation between Twetten and him.

¶11 After viewing the videotape and considering the testimony, we conclude the evidence is sufficient to permit a reasonable fact-finder to conclude by clear, satisfactory and convincing evidence, viewed most favorably to the State and the conviction, that Lounsbury engaged, in a public place, in profane and boisterous behavior that tended to cause a disturbance.

¶12 Lounsbury contends that he was acting in self-defense. However, the conduct on which the court relied was not conduct directed toward Twetten, but to the bar manager. In addition, the State contends that Lounsbury did not raise the issue of self-defense during the trial and, therefore, he has waived the right to raise it on appeal. In reply Lounsbury does not contend that he did raise the issue of self-defense in the circuit court. Accordingly, we accept this as an implicit concession that this is true. *See* ***Schlieper v. DNR***, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994) (We may take as a concession the failure in a reply brief to refute propositions in a responsive brief.).

¶13 Lounsbury also contends that finding him guilty of disorderly conduct violates his First Amendment rights. This is an undeveloped argument and, for that reason, we do not address it. In addition, according to the State and not disputed by Lounsbury, he did not make this argument in the circuit court. Most importantly, the circuit court's finding was based on evidence that involved

his conduct when the bar manager was trying to get him to leave, not his statements about veterans.

¶14 Lounsbury points to evidence in the record that, he says, supports a finding that he did not engage in disorderly conduct and gives reasons why the court should not have credited the testimony of the other witnesses. However, as already noted, when we review a challenge to sufficiency of the evidence, we do not look for the evidence that might support a different verdict but instead view the evidence most favorably to the verdict reached by the fact-finder. *See* ***Global Steel Products***, 253 Wis. 2d 588 at ¶10.

CONCLUSION

¶15 Because we conclude there is sufficient evidence, we affirm the circuit court's order.

By the Court.—Order affirmed.

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