COURT OF APPEALS
DECISION
DATED AND FILED

November 5, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-1083

Cir. Ct. Nos. 01-FO-1589
01-FO-1592

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

CITY OF SUPERIOR,

PLAINTIFF-RESPONDENT,

V.

HUNTER HILL,

DEFENDANT-APPELLANT.

CITY OF SUPERIOR,

PLAINTIFF-RESPONDENT,

V.

WENDY HILL,

DEFENDANT-APPELLANT.

APPEAL from judgments of the circuit court for Douglas County: MICHAEL T. LUCCI, Judge. *Affirmed*.

¶1 CANE, C.J.[1] Hunter Hill and Wendy Hill appeal judgments finding they violated the City of Superior's disorderly conduct ordinance. The Hills contend their actions did not constitute disorderly conduct under the language of the ordinance. In addition, Hunter argues his actions were constitutionally protected speech. We determine Hunter's conduct was not constitutionally protected. We further conclude both Hunter's and Wendy's actions constituted disorderly conduct under the ordinance and therefore affirm the trial court's judgments.

BACKGROUND

¶2 On the evening of August 25, 2001, sergeant major Patrick Hill and his family celebrated his retirement from the United States Army. Several members of the Hill family, including Patrick's wife, Wendy, and his son, Hunter, along with some family friends, rented a limousine to take them to several restaurants and taverns in Superior.

¶3 After midnight, the party made its way to a bar called Centerfolds. The bouncers at Centerfolds refused to admit them, and an altercation developed between the Hills and the bouncers.[2] After kicking the party out of the building, the bouncers called the police.

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[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

[2] The record does not reflect why the Hills were refused entry or why the altercation developed.

¶4 The first officer to arrive was Bonita Johnson. At the Hills' trial, she testified she spoke with Hunter, asking him what had happened. Hunter told her his father had left and everything was all right, and then refused to answer any other questions.

¶5 A short time later, officer Christopher Kirchoff arrived. At trial, he testified there was an "agitated" crowd of people standing on the street around the squad cars and on the sidewalk, watching the incident. He said he talked with Hunter, asking if he had already talked with the police. According to Kirchoff, Hunter replied "fuck you" in an adversarial tone and added "I suppose you think you can make me stay here," saying both phrases loud enough for the crowd to hear. In addition, Kirchoff said he smelled alcohol on Hunter and believed he was intoxicated. Kirchoff then arrested Hunter. While being escorted to the car, Hunter asked Kirchoff his name so he could "find you when you're off duty [and] kick your fucking ass." Hunter also continued to yell other obscenities.

¶6 Kirchoff testified Wendy Hill approached him while he was handcuffing Hunter and began yelling obscenities, further drawing the crowd's attention. Kirchoff said he heard others telling her not to confront the police. Both Kirchoff and another officer told Wendy several times to stand back, which she refused to do. Kirchoff testified Wendy yelled "Fucking assholes, this is another example of the Superior fucking police," while he was arresting Hunter. Kirchoff then arrested Wendy as well.

¶7 The City charged Hunter and Wendy with disorderly conduct in violation of SUPERIOR, WIS., CODE OF ORDINANCES § 23-4(a).[3] Hunter and Wendy tried their cases jointly to the court. The City offered the testimony of officers Johnson and Kirchoff. In addition to recounting her brief discussion with Hunter, Johnson's testimony generally supported Kirchoff's recollection of the events.

¶8 Hunter and Wendy both testified. Hunter said he might have told Kirchoff, "I don't have to show you my f'ing identification." He denied making the specific threat to harm Kirchoff but admitted he made other threats after he was in the squad car. Wendy testified she approached Kirchoff to find out why Hunter was being arrested. She said she was told to stand back and also to "shut the hell up, you're going next." Wendy admitted she then told Kirchoff, "that's why you have the reputation yous [sic] have as assholes." She said she was arrested after she said this. Both Wendy and Hunter admitted drinking alcohol that evening. In addition, the Hills offered the testimony of several other party members, who generally supported Hunter's and Wendy's testimony.

¶9 In a written decision, the circuit court determined Hunter and Wendy had violated the ordinance and assessed them each a $188 forfeiture. They both appeal.

[3] All references to the SUPERIOR, WIS., CODE OF ORDINANCES are to the 2001 edition unless otherwise noted. Patrick was also charged with disorderly conduct. He paid his fine prior to Hunter's and Wendy's trial.

DISCUSSION

¶10 SUPERIOR, WIS., CODE OF ORDINANCES § 23-4(a) prohibits the same conduct as WIS. STAT. § 947.01, which provides: "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 a Class B misdemeanor." The maximum penalty for violating § 23-4(a) is a forfeiture of $188.

¶11 Ordinance violations constituting violations of Wisconsin criminal laws require proof by clear, satisfactory and convincing evidence. ***Monroe County v. Kruse***, 76 Wis. 2d 126, 130, 250 N.W.2d 375 (1977). As in other civil cases, we will not overturn the circuit court's findings unless they are clearly erroneous. *See* ***Madison v. Geier***, 27 Wis. 2d 687, 690, 135 N.W.2d 761 (1965).

¶12 Our resolution of ordinance violation appeals begins with the trial court's findings. ***Kruse***, 76 Wis. 2d at 130. Here, the court found Hunter's actions, while consisting of speech only, still constituted disorderly conduct. Looking at the surrounding circumstances, including the language used, the tone and volume of his voice, the location of the speech and who heard it, the court concluded Hunter's actions had a tendency to disrupt good order and provoke a disturbance.

¶13 The court also found Wendy's conduct disorderly, saying her actions had a greater tendency to provoke a disturbance than Hunter's. In its decision, the court noted Wendy's use of abusive language while confronting Kirchoff and her repeatedly approaching Kirchoff after being told to stand back. The court also pointed to the fact that Wendy's conduct was in front of a crowd, that she had been drinking, and the general unruly atmosphere of the arrest scene.

¶14 To prove disorderly conduct the City must show: (1) the defendant engaged in violent, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly conduct and (2) that conduct, under the circumstances as they then existed, tended to cause or provoke a disturbance. WIS JI—CRIMINAL 1900. Disorderly conduct can include physical acts or language or both. ***State v. Douglas D.***, 2001 WI 47, ¶22, 243 Wis. 2d 204, 626 N.W.2d 725; ***Teske v. State***, 256 Wis. 440, 444, 41 N.W.2d 642 (1950). It is not necessary that a disturbance actually occur. ***City of Oak Creek v. King***, 148 Wis. 2d 532, 545, 436 N.W.2d 285 (1989). The trier of fact must consider the nature of the conduct and the surrounding circumstances. WIS JI—CRIMINAL 1900. What is proper under one set of circumstances may be improper under another. ***Id.***

¶15 The evidence supports the trial court's decision regarding Hunter. The trial court is the sole judge of the credibility of the evidence. *See* WIS. STAT. § 805.17(2). Here the court chose to believe Kirchoff's testimony regarding Hunter's statements. The court noted Hunter's actions were loud, in public and in front of a growing crowd, tending to provoke a disturbance. This decision is not clearly erroneous.

¶16 Hunter contends, however, that the court erred because it did not find his conduct constituted a "true threat." He argues the court must find his speech to be a "true threat" in order to punish him. In support, he points to ***Douglas D.***, where the supreme court said a student's written story describing the killing of his teacher could not be punished as disorderly conduct because it was protected speech. ***Douglas D.***, 2001 WI 47 at ¶47. The court said in order for the story to be punishable, it had to constitute a "true threat." ***Id.*** at ¶34. A true threat is a statement in light of all the surrounding circumstances that a speaker would foresee the listener interpreting it as a serious expression of a purpose to inflict

harm. ***Id.*** Hunter argues his speech did not constitute a "true threat" and is therefore not punishable.

¶17 We disagree. We do not read ***Douglas D.*** to require that all speech forming the basis of a disorderly conduct charge constitute a true threat. Instead, it is only when that language is a threat that it must be a "true threat" to constitute disorderly conduct. In ***Douglas D.***, the court approvingly cited ***Lane v. Collins***, 29 Wis. 2d 66, 138 N.W.2d 264 (1965), for the proposition that using abusive language to another person under charged circumstances can constitute disorderly conduct. ***Douglas D.***, 2001 WI 47 at ¶23. Hunter's pre-arrest language was not a threat and we need not subject it to a "true threat" analysis.

¶18 Nor are we persuaded by Hunter's argument that his speech did not constitute disorderly conduct because it was directed at a police officer. He points to ***City of Milwaukee v. Wroten***, 160 Wis. 2d 207, 466 N.W.2d 861 (1991), in which our supreme court struck down a Milwaukee ordinance prohibiting interference with the duties of police officers as unconstitutionally overbroad. ***Id.*** at 235. WISCONSIN STAT. § 947.01 has, however, survived similar challenges. *See* ***State v. Zwicker***, 41 Wis. 2d 497, 513, 164 N.W.2d 512 (1969). Further, the fact that the abusive language is directed to a police officer, even if it is not overheard by others, does not prevent it from being disorderly conduct. ***Lane***, 29 Wis. 2d at 72.

¶19 Here, the court determined Hunter's language was loud, abusive and overheard by others. His conduct occurred after he had been drinking, in a public place, and in the presence of the police and others. Considering these circumstances, the trial court did not err by finding Hunter's actions were of a type tending to cause or provoke a disturbance.

¶20 Nor did the trial court err by finding Wendy had violated the ordinance. While Wendy argues she was merely inquiring about Hunter, the court's findings regarding her behavior show otherwise. The court specifically pointed to her loud and abusive language, her confrontation of Kirchoff, her drinking, and that her actions took place in front of a group of people. Wendy's actions tended to cause or provoke a disturbance as well.

¶21 Wendy argues her mere presence on the street and challenge to her son's arrest cannot constitute disorderly conduct. She relies on ***State v. Werstein***, 60 Wis. 2d 668, 211 N.W.2d 437 (1973). In ***Werstein***, the supreme court overturned the disorderly conduct convictions of several antiwar protesters who were at an Army induction center. ***Id.*** at 677. The protestors refused to leave after the commanding officer and police ordered them to do so. ***Id.*** at 670. The court said their conduct was not "otherwise disorderly" because the protestors had a legal right to be in the center and were not acting in any way that caused a disturbance. ***Id.*** at 674. Wendy's premise is faulty. While she may have had a legal right to be on the street, Wendy did not have a right to act as she did. The protestors in ***Werstein*** did not engage in loud or abusive conduct. ***Id***. at 671. Wendy did, and her conduct was disorderly.

By the Court.—Judgments affirmed.

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