COURT OF APPEALS
DECISION
DATED AND RELEASED

September 7, 1995

No. 95-1247-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JAMES B. JOHNSON,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for La Crosse County: PETER G. PAPPAS, Judge. *Affirmed*.

GARTZKE, P.J. James Johnson appeals from a judgment of conviction for bail jumping, § 946.49(1)(a), STATS., a misdemeanor.[1] The sole issue is whether the evidence was sufficient to establish that Johnson had committed the underlying offense of disorderly conduct, § 947.01, STATS., which provides

[1] This appeal is decided by one judge pursuant to § 752.31(2)(f), STATS.

> 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.

Because Johnson was found guilty following a jury trial, the question is whether the evidence, viewed in the light most favorable to his conviction, is so lacking in probative value and force that as a matter of law no reasonable fact finder could have found him guilty beyond a reasonable doubt. ***State v. Poellinger***, 153 Wis.2d 493, 507, 451 N.W.2d 752, 757-58 (1990).

On August 15, 1994, a La Crosse Police Department cadet, a civilian employee, was driving a squad car and giving parking tickets. She saw Johnson and a female standing in the middle of the street. Johnson gave the employee "the finger." A block later the employee stopped at the roadside because she saw small children whom she usually talked to. She saw Johnson coming across the parking lot toward her. She then looked down in her car to see if she had plastic badges to give the children, and when she looked up she saw Johnson standing on the corner within a few feet of the children. He again gave the employee the "middle finger."

After Johnson walked away from the children, the employee confronted him and asked if he had a problem. He responded, "You are a fucking pig and I hate fucking pigs." Johnson said that he had had a confrontation with the police a few nights earlier and then asked if this was going to be another Rodney King beating, and began to talk about Rodney King. Thinking that Johnson was acting strangely, the employee called for assistance.

A short time later police officers arrived. The employee questioned Johnson and saw he was nervous and paranoid. At that time a woman walked by with her husband and two small children. Johnson reached out and grabbed the woman by the arm and screamed at her. The woman and her husband and children then walked hurriedly away. Two nurses later walked by and Johnson turned and hollered at them. They too hurried away.

At this point Johnson went to the middle of the street and began screaming. The officers tried to get him back on the curb for his own safety but he continued screaming for somebody to please come and witness "this fucking beating." The officers gradually approached him, and grabbed Johnson by the arms. Once grabbed, Johnson did not resist.

Johnson argues that because § 947.01(1), STATS., is aimed at "substantial intrusions which offend the normal sensibilities of average persons or which constitute significantly abusive or disturbing demeanor in the eyes of reasonable persons ...." ***State v. Givens***, 28 Wis.2d 101, 122, 135 N.W.2d 780, 787 (1965), the evidence is insufficient to establish the underlying offense of disorderly conduct. He notes that a defendant's conduct when yelling at the police officers does not necessarily constitute disorderly conduct. ***State v. Becker***, 51 Wis.2d 659, 665, 188 N.W.2d 449, 452 (1971), and that a person may direct opprobrious and obscene words at the police without guilt of disorderly conduct attaching. *See* ***Lewis v. New Orleans***, 415 U.S. 130 (1974).

The precedents on which Johnson relies would be on point had his conduct been directed at, and solely in the presence of, the police and the La Crosse employee. However, he reached out and grabbed a woman by the arm and screamed at her in the presence of her husband and two small children. Johnson also turned and hollered at two nurses. Moreover, while giving a cadet "the finger" is not in itself disorderly conduct, doing so in the presence of children is another matter. Children should not be subjected to that universal symbol of contempt and sexual content.

The evidence was such that a reasonable jury could conclude beyond a reasonable doubt that Johnson's conduct was violent when directed at the woman passerby, and unreasonably loud when directed at the woman passerby, her family and the two nurses. His conduct was offensive to the normal sensibilities of average persons. The jury could infer from the reactions of the couple with the children and the two nurses that persons of normal sensibilities were in fact offended. We do not base our decision on what Johnson said and gestured to the police cadet. We base our decision on what he did and how he spoke to others present.

By the Court.--Judgment affirmed.

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