COURT OF APPEALS
DECISION
DATED AND RELEASED

October 31, 1995

No. 95-1438-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KIMMY CHESSER,

Defendant-Appellant,

ANGELA L. HALE,

Defendant.

APPEAL from a judgment of the circuit court for Milwaukee County: CHARLES F. KAHN, JR., Judge. *Affirmed with directions.*

SCHUDSON, J.[1] Kimmy Chesser appeals from the judgment of conviction, following a jury trial, for disorderly conduct while armed, party to a crime, contrary to §§ 947.01 and 939.05, STATS.[2] Chesser argues that the trial

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

[2] The judgment of conviction reflects a conviction for endangering safety by use of dangerous

court erred in denying his motion for a directed verdict. He also argues that the evidence was insufficient to support the conviction. This court affirms.

According to the trial evidence, on August 17, 1993, a dispute developed between neighboring families. Some juveniles began fighting and some adults, one of whom was Chesser, attempted to intervene. Several citizen witnesses testified that Chesser ran into a house, came back outside carrying a stick, went back to the house, returned with a knife, and brandished that knife while threatening various persons involved in the fight. Chesser testified and confirmed that he had retrieved a stick and butcher knife from the house. He did, however, dispute that he brandished the knife, claiming that he held it down by his side. He also stated that after he was outside with the knife for about five minutes, he "realized what in the world am I doing," and "ran back in the house to put the knife back in the kitchen." He also testified, "I got a little loud, got a little disorderly."

Chesser first argues that the court should have granted his motion for a directed verdict at the close of the State's case because "[n]owhere in the [disorderly conduct] statute or in the jury instructions for this particular offense, is there any mention of the continuing of a disturbance as being an element of the crime." Therefore, he maintains, because he merely continued a disturbance but did not "cause or provoke" a disturbance, he could not be convicted.

Section 947.01, STATS., 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.

(..continued)
weapon, party to a crime, contrary to §§ 941.20(1)(c) and 939.05, STATS. The full record confirms, however, that the trial court granted the State's motion to amend the charge to disorderly conduct while armed, and the trial proceeded on that basis. Therefore, while affirming, this court remands the case to the trial court for entry of a corrected judgment of conviction reflecting the correct charge.

The trial court instructed the jury:

> The second element of this offense requires that the defendant's conduct under circumstances as they then exist tended to cause or provoke a disturbance.
>
> It is not necessary then that an actual disturbance must have resulted from the defendant's conduct. The law requires only that the conduct be of a type which tends to cause or provoke a disturbance under the circumstances as they then existed.

This court reads nothing in the statute or the jury instruction to require that one create or initiate a disturbance to be guilty of disorderly conduct. Obviously, if that were so, countless offenders who join in a fight could never be convicted despite their participation. This would make no sense. *See* ***State v. West***, 181 Wis.2d 792, 796, 512 N.W.2d 207, 209 (Ct. App. 1993) (courts reject absurd or unreasonable interpretations of statutes). As each participant joins the fight, he or she "tends to cause or provoke a disturbance" because, without such conduct, the fight might end. Although "fueling the flames" is not always or necessarily as dangerous as igniting the fire, it certainly "tends to cause or provoke" the conflagration.

Chesser also argues that the evidence was insufficient to support the conviction.

> [I]n reviewing the sufficiency of the evidence to support a conviction, an appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it

> believes that the trier of fact should not have found guilt based on the evidence before it.

State v. Poellinger, 153 Wis.2d 493, 507, 451 N.W.2d 752, 757-758 (1990) (citations omitted). Where there are inconsistencies in the testimony of witnesses, it is the jury's duty to determine the weight and credibility of the testimony. ***Thomas v. State***, 92 Wis.2d 372, 381-382, 284 N.W.2d 917, 922-923 (1979). This court will substitute its judgment for that of the trier of fact when the fact-finder relied on evidence that was "inherently or patently incredible—that kind of evidence which conflicts with nature or with fully-established or conceded facts." ***State v. Tarantino***, 157 Wis.2d 199, 218, 458 N.W.2d 582, 590 (Ct. App. 1990).

Several witnesses described Chesser's armed and threatening conduct. Chesser confirmed much of what they said and even conceded that he was "a little disorderly." The evidence clearly was sufficient to support the jury's verdict.

By the Court. – Judgment affirmed with directions.

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