COURT OF APPEALS
DECISION
DATED AND RELEASED

January 17, 1996

NOTICE

No. 95-2060

STATE OF WISCONSIN IN COURT OF APPEALS

DISTRICT II

CITY OF KENOSHA,

Plaintiff-Appellant,

v.

TIMOTHY M. CLARK,

Defendant-Respondent.

APPEAL from a judgment of the circuit court for Kenosha County: ROBERT V. BAKER, Judge. *Affirmed.*

BROWN, J. The jury found Timothy M. Clark, a convenience store manager, not guilty of disorderly conduct. The alleged ordinance violation arose out of an altercation involving him and several juveniles who were waiting outside his store. The City of Kenosha now appeals alleging that the trial court permitted Clark to exercise an illegal, race-based peremptory strike of an African-American juror. It also raises two evidentiary challenges

and argues that the jury should have been instructed on the authority of a storekeeper to hold a person accused of shoplifting. We uphold the finding that Clark's jury strike was based on legitimate factors. We further conclude that the other alleged errors were all within the bounds of the trial court's discretion and thus affirm the verdict.

The convenience store where the disturbance took place is located a few blocks from a junior high school. After class hours, students often come to buy snack food. The management, however, has a policy of allowing only two youths in the store at one time. As a result, on this date, a line of teenagers had formed outside the store waiting to get inside.

Apparently, some of the teenagers waiting in line started to yell at other youths who were across the street. Clark became concerned that the teenagers waiting outside were disturbing his adult customers and were inhibiting their ability to enter and exit the store. Thus, he went outside to confront the youths. At this point, the facts are disputed, but the City's theory is that Clark overreacted after one of the teenagers approached and confronted him. The City alleges that Clark accosted him and then dragged him inside. Indeed, the City contends that Clark had the wrong person; he did not have the teenager who was actually yelling to the people across the street.

However, Clark maintained before the jury that he only went outside to calm things down and to clear a path for his other customers. Clark admits that he grabbed the teenager, but only after the youth told him that there was nothing he could do to remove him from the premises. Clark further

claimed that his goal was to hold the youth until the police arrived and straightened things out.

Although the teenager claims that Clark refused his request to have his parents brought to the store, a police officer was summoned and he spoke with Clark and the youth. The officer eventually removed the teenager from the store and took his statement. Later that day, a citation for disorderly conduct was issued to Clark.

The City of Kenosha Municipal Court found Clark guilty and the case was subsequently appealed to the trial court and scheduled for a six-person jury trial. After hearing two days of testimony, the jury found Clark not guilty. The City now appeals based on the errors outlined above.

We first turn to the City's concern over improper jury selection. Here, it asserts that Clark used his peremptory strikes to remove the only African-American juror within the pool. *See* ***Batson v. Kentucky,*** 476 U.S. 79 (1986). The City explains that the victims of Clark's disorderly conduct, especially the youth who he held in the store until the police arrived, were all African-American and that the officer on the scene was also African-American. It contends that Clark's trial strategy involved "play[ing] the race card." That is, Clark tried to secure an all-white jury which would likely sympathize with him, a white storekeeper who was troubled by an unruly group of African-American teenagers and was then subjected to "selective arrest and prosecution."

In response, Clark simply points to the trial court's handling of this issue. He first explains that the ***Batson*** decision provides that a prima facie showing of race-based jury strikes may be countered by neutral reasons supporting exclusion of the juror. *See* ***id.*** at 97; ***State v. Walker***, 154 Wis.2d 158, 174, 453 N.W.2d 127, 134, *cert. denied*, 498 U.S. 962 (1990). Even if a prima facie case of race-based selection could be made, Clark argues that there was a sufficient, race-neutral reason sustaining his choice, namely that this juror was a friend of a potential witness for the prosecution.

Our review of the record shows that Clark's decision to strike the only African-American juror in the pool was challenged by the City. And when questioned by the trial court, Clark's counsel described how the juror knew a witness and that this person had observed the scuffle, was subpoenaed and was tentatively scheduled to testify. Accordingly, the trial court found that Clark's selection of this jury was without "any racial motivation."

We must afford deference to the trial court's finding that Clark's strike was legitimate. *See* ***State v. Lopez***, 173 Wis.2d 724, 729, 496 N.W.2d 617, 619 (Ct. App. 1992) (applying "clearly erroneous" standard). In fact, the record reveals that during the voir dire, this juror volunteered that he knew this witness. While Clark's opening and closing arguments may suggest that he viewed the "race card" as a viable strategy, the City has not provided factual grounds showing that Clark's choice to exclude this juror was based on anything except a legitimate concern about a juror's personal relationship with a

potentially adverse witness. *See* ***State v. Waites***, 158 Wis.2d 376, 394, 462 N.W.2d 206, 213 (1990).

Next, we turn to the evidentiary issues the City raises. First, it contends that the trial court erred when it admitted certain excerpts of a videotape taken from the store's monitoring cameras. The challenged portions allegedly show an altercation between Clark and the father of the teenager who was taken and held in the store. The father came to the store about twenty minutes after the police left.

The transcript demonstrates that the trial court's rationale for admitting the tape seemed to be based on a concern that the jury should be able to view the entire incident. It described how the original altercation and the later eruption "did occur … within about the same time here" and added that "[v]ery seldom we ever get a picture as to what happens."

Nonetheless, we are unable to reach the merits of the City's charges because the videotape was not made part of the appellate record. We cannot determine its relevance without actually viewing its contents. When evidentiary issues are appealed, the issue is whether the trial court exercised its discretion in accordance with accepted legal standards and the facts of record. *See* ***Christensen v. Economy Fire & Casualty Co.***, 77 Wis.2d 50, 55-56, 252 N.W.2d 81, 84 (1977). While the trial transcript informs us of the trial court's reasoning, without the videotape we are unable to fully discern the facts of record. When faced with an incomplete record, we assume that the missing components contain every fact essential to sustain the trial judge's discretionary

choice. ***Austin v. Ford Motor Co.***, 86 Wis.2d 628, 641, 273 N.W.2d 233, 239 (1979). Thus, we affirm this ruling.[1]

The City also challenges the trial court's ruling allowing Clark to elicit redirect testimony from one of his witnesses. The transcript reveals that Clark called the officer who arrived at the scene. During the direct testimony, he inquired into the general facts surrounding the disturbance and whether any other party had received a citation for this disturbance. The City's cross-examination further focused on the officer's actions at the scene.

However, after the City finished its cross- examination, Clark sought further testimony which went beyond the scope of his first examination. Here, Clark inquired about the officer's observations after he came back to help settle the second altercation involving the father. Although the City raised an immediate objection, the trial court agreed with Clark that this issue was brought out by the City during its cross-examination and thus reasoned that Clark should be able to explore the issue through redirect testimony.

In this appeal, the City seems to make two separate claims against the admission of the testimony elicited on Clark's redirect. First, it contends that the trial court abused its discretion by even allowing Clark to conduct a reexamination of its witness. However, as shown above, the trial court found that his redirect was prompted by the scope of the City's cross-examination. We

[1] The record does include a reference to the videotape as a trial exhibit. However, our inquiry showed that the Kenosha County clerk's office requires a party to make a specific request before a trial exhibit is included in an appellate record. Since this request was never made, the tape was never delivered to this court.

find that this ruling was within the bounds of the trial court's wide discretion in controlling the scope of examination. *See* ***State v. Cydzik***, 60 Wis.2d 683, 690 n.10, 211 N.W.2d 421, 426 (1973).

Second, the City objects to the content of the testimony elicited during Clark's redirect examination, i.e., the officer's description of how violent the fight was between Clark and the teenager's father. The City argues that evidence of this second altercation is not relevant to the disorderly conduct charge which stems only from Clark's treatment of the teenager. In fact, this is the substance of its objection to the admission of the videotape evidence showing the fight between Clark and the father.

However, our review of the transcript demonstrates that the trial court found this evidence to be relevant because it helped shape the credibility of the officer's testimony. Part of Clark's theory was that he was being selectively targeted and that his charges only came about because of the officer's personal bias. Since the court admitted the videotape showing the altercation between Clark and the teenager's father (which also portrayed how the officer handled the situation), then it seems logical that he should also be able to directly examine the officer about his conduct on the scene.

Finally, we address the argument that the jury should have been instructed about a storekeeper's right to hold a person accused of shoplifting. During the trial, the officer testified that he told Clark that, as a storekeeper, he had no legal right to hold the teenager in his store unless he believed that the youth had shoplifted. In response, Clark examined the officer about the right to

make a citizen's arrest and asked the court to take judicial notice that the common law authorizes a citizen's arrest under these circumstances.

Subsequently, during the instructions conference, the parties debated the status of the common law right to make a citizen's arrest. The City contended that it was a very confined concept, limited to a merchant's right to stop a person suspected of shoplifting, *see* § 943.50(3), STATS., and thus submitted a proposed instruction; it stated:

> Wisconsin does not recognize the concept of self help. A store keeper cannot hold a citizen against his will unless an adult personally observed that a retail theft has occurred. There is no evidence in this case that a retail theft had occurred.

However, Clark argued that the common law concept of citizen's arrest was alive and well within Wisconsin and had not been narrowed by the legislative enactment of the merchant-focused law. The trial court agreed with Clark; it stated:

> I appreciate [counsels'] arguments. Both have merit regarding citizen's arrest and what the storekeeper is and what the law is. Quite frankly, I think the law is unclear in Wisconsin on it. Personally, I would believe that a storekeeper would have the right under these circumstances to hold the boy until the police came based on his prior experience.

Accordingly, the trial court denied the City's instruction request.

The City now renews its argument that Wisconsin law is not muddled. It contends that the trial court's decision not to submit the instruction

was a misuse of discretion because there was a clear legal (and factual) basis supporting it.

We first observe that the trial court's discretion when instructing a jury involves making a determination of the current state of the law. *See* ***Young v. Professionals Ins. Co.***, 154 Wis.2d 742, 746, 454 N.W.2d 24, 26 (Ct. App. 1990). Further, our review of the applicable case law and authority reveals that the trial court properly assessed the City's position and was correct to reject the proposed instruction.

The City argues that Clark was not authorized to hold the teenager because there was no evidence of shoplifting and relies primarily on ***Drabeck v. Sabley***, 31 Wis.2d 184, 142 N.W.2d 798 (1966). There, the supreme court faced a claim by a ten-year-old boy who was stopped and held by a motorist who had been hit by one of the youth's snowballs. Although the boy lived a few yards away from the scene, the motorist took him into town and handed him over to the police. ***Id.*** at 187, 142 N.W.2d at 800.

In reaching its conclusion, the court first acknowledged that "[i]t is recognized that one may be privileged to interfere with the liberty of another, within limits, for the purpose of defending one's self, defending a third person, or preventing the commission of a crime." ***Id.*** at 187, 142 N.W.2d at 799; *see also* RESTATEMENT (SECOND) OF TORTS § 119(c) (1964). But, faced with those facts, the court held that the driver's actions were not privileged as a matter of law because the boy could have been easily taken to his parents instead of being dragged into town. *See* ***Drabeck***, 31 Wis.2d at 187, 142 N.W.2d at 800.

The City argues that ***Drabeck*** essentially eliminated the common law "privilege" to make a citizen's arrest or, in the least, Clark was bound to respond to the teenager's request that he be able to talk to his parents as a matter of law. However, there is no evidence in the record that the teenager lived only a few houses from the store or that his parents could arrive at the scene earlier than the police. We do not believe that Clark's decision to summon the police instead was so unreasonable that the "privilege" alluded to in ***Drabeck*** was not applicable in these circumstances. *See* ***id.***

Thus, without a concrete example that the "privilege" of a citizen's arrest is no longer applicable to situations like those before the trial court, we cannot conclude that it was a misuse of discretion to refuse a jury instruction to this effect.[2]

To summarize, we find no grounds for upsetting the trial court's finding that Clark's jury selection was race neutral. Further, the City has not established that the trial court's evidentiary rulings were outside the bounds of its discretion. Finally, we hold that the trial court's decision to reject the City's

[2] The City also points to this court's decision in ***City of Madison v. Two Crow***, 88 Wis.2d 156, 159, 276 N.W.2d 359, 361 (Ct. App. 1979), where we stated that "[t]he power to arrest must be authorized by statute." Since there is no specific statute authorizing a "citizen's arrest" in situations involving civil disobedience, the City asserts that no such authority exists. However, the use of the term "arrest" in ***Two Crow*** did not refer to all circumstances when a person is physically restrained. The ***Two Crow*** court specifically faced a claim of unlawful "arrest" by a law enforcement officer. ***Id.*** at 157-58, 276 N.W.2d at 360-61; *see also* ***State v. Swanson***, 164 Wis.2d 437, 446-47, 475 N.W.2d 148, 152 (1991) (describing test to measure an "arrest" by a law enforcement officer). Thus, the ***Two Crow*** decision provides no assistance in defining the scope of Wisconsin's common law right to make a *citizen's arrest*.

proposed jury instruction was based on a proper interpretation of existing law and was thus a correct exercise of discretion.

By the Court.—Judgment affirmed.

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