COURT OF APPEALS
DECISION
DATED AND RELEASED

January 24, 1996

NOTICE

No. 95-2334

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

CITY OF SHEBOYGAN,

Plaintiff-Respondent,

v.

TOBY T. WATSON,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Sheboygan County: JOHN B. MURPHY, Judge. *Affirmed*.

NETTESHEIM, J. Toby T. Watson appeals from a forfeiture judgment based upon the trial court's determination following a bench trial that Watson had furnished alcoholic beverages to a minor in violation of a City of Sheboygan ordinance. On appeal, Watson argues that the evidence does not support the court's guilty finding and that the court did not sufficiently set out its findings pursuant to § 805.17(2), STATS. We reject Watson's arguments and affirm the judgment.

Watson is the licensee of the Downtown Club, a tavern establishment in the city. On December 31, 1994, Anita Baker, then nineteen years of age, entered the club with her friend, Shelly Rau, who was then twenty-one years of age. According to Baker's testimony, when she entered the club, an officer in a blue uniform and a bouncer were present. When asked for identification, Baker stated that she did not have any identification with her, but that she was twenty-one years of age. She was then admitted to the club. Rau testified that as she was presenting her identification at the entrance, she saw Baker speaking with a uniformed officer and that she did not see Baker present any identification. While at the club, Baker was served alcoholic beverages.

After leaving the club, Baker was stopped while driving an automobile. She was cited for operating a motor vehicle without an operator's license and, eventually, for operating a motor vehicle while intoxicated. In response to interrogation by the arresting officer, Baker stated that she had been at the Downtown Club and that she had been admitted without showing any identification. Based on this information, Baker was also cited for underage consumption of alcohol and Watson was cited for furnishing alcoholic beverages to a minor.

Watson testified that he neither recalled nor recognized Baker or Rau. He testified that the club always has someone checking identification at the entrance door and that no one is admitted without proper identification. Carl Borstad, a security guard for the club, testified that he was on duty on the evening in question and was wearing a blue uniform. He did not recognize

Baker or Rau. He stated that he would not have admitted anyone without proper identification. The bouncer was out of the country at the time of the trial and did not testify.

Following the close of the evidence, the trial court adopted Baker's testimony that she had been admitted to the club without producing identification. The court found Watson guilty and he appeals.

When the trial court acts as the finder of fact, it is the ultimate arbiter of the credibility of the witnesses and the weight to be given to their testimony. ***Gehr v. City of Sheboygan***, 81 Wis.2d 117, 122, 260 N.W.2d 30, 33 (1977); *see also* § 805.17(2), STATS. A trial court's factual findings will not be set aside unless clearly erroneous, and we must give due regard to the ability of the trial court to judge the credibility of the witnesses. Section 805.17(2).

Watson contends that his testimony regarding the club's policy requiring identification for all patrons, coupled with Borstad's testimony that he would not have admitted Baker without proper identification, renders Baker's testimony that she was admitted to the club without identification implausible and not worthy of belief. We disagree.

First, neither Watson nor Borstad specifically recalled or recognized Baker. Second, Borstad admitted that he was not monitoring the entrance during the entire evening, and he acknowledged that the bouncer, not the security guard, was primarily responsible for the identification checks. As noted, the bouncer did not testify. Third, and most importantly, we reject the

premise of Watson's argument which contends that Baker unequivocally testified that she was challenged at the entrance to the club by a blue-uniformed officer. While portions of Baker's testimony support this premise, other portions do not. When first questioned on this matter, Baker testified that the person who "carded" her was "the officer," but she immediately further described him as "the bouncer." Later she testified that both the officer and the bouncer carded her. Still later, she testified that she could not identify the person in court wearing the blue uniform as the person who carded her.

In light of these waverings, the trial court's observation that Baker's testimony was "sketchy" in this regard was well taken. While Baker's less than precise testimony on this point may have provided a reasonable basis for rejecting Baker's testimony in toto, the trial court was not obligated to do so.

Thus, the trial court was entitled to adopt Baker's other testimony that she was admitted to the club without producing the required identification. In making this credibility determination, the court properly assessed any possible motive for Baker to falsely testify. *See* WIS J I—CRIMINAL 300; WIS J I—CIVIL 215. Noting that Baker had herself been charged with multiple offenses regarding her role in the events, the court could discern no basis for Baker to fabricate her testimony.

Where the evidence supports the drawing of two conflicting but reasonable inferences, the trial court, not this court, must decide which inference to draw. ***Plesko v. Figgie Int'l***, 190 Wis.2d 764, 776, 528 N.W.2d 446,

450 (Ct. App. 1994). Such is the case here. We conclude that the evidence supports the trial court's guilty finding and that the City met its burden of proof.

Watson also contends that the trial court's bench decision fails to adequately set forth the ultimate facts as required by § 805.17(2), STATS. Specifically, Watson complains that the court's decision fails to adequately address the testimony of Watson, Borstad and Rau that Baker spoke with a blue-uniformed officer. However, as we have already observed, neither Watson nor Borstad specifically recalled or recognized Baker. And, as we have also already noted, Baker's testimony was vague as to whom she spoke with regarding identification. Thus, the various testimonies of Baker, Watson and Borstad are not necessarily at loggerheads.

It is true that the trial court did not expressly address Rau's testimony that she saw Baker talking to a police officer. However, a trial court's obligation pursuant to § 805.17(2), STATS., is to find the "ultimate facts," not evidentiary facts. *See* ***Finkelstein v. Chicago & N. W. Ry.***, 217 Wis. 433, 439, 259 N.W. 254, 256 (1935). Moreover, a trial court's failure to address evidence which arguably contradicts the court's ultimate fact determination does not necessarily mean that the court did not consider the contrary evidence. *See* ***Chernetski v. American Family Mut. Ins. Co.***, 183 Wis.2d 68, 80, 515 N.W.2d 283, 288-89 (Ct. App. 1994). The trial court's duty only extends to finding ultimate facts upon which a judgment rests. ***Walber v. Walber***, 40 Wis.2d 313, 319, 161 N.W.2d 898,

901 (1968). We conclude that the trial court's decision properly recited the ultimate facts upon which the judgment against Watson rests.

By the Court.—Judgment affirmed.

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