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DISTRICT IV

September 24, 2013

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You are hereby notified that the Court has entered the following opinion and order:

2012AP1067-CR State of Wisconsin v. Jared D. Johnson (L.C. # 2011CM2334)

Before Blanchard, P.J., Sherman and Kloppenburg, JJ.

Jared Johnson appeals a judgment convicting him of disorderly conduct following a trial to the court. After reviewing the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21(1) (2011-12).[1] We affirm.

Whenever a case is tried without a jury, the circuit court "shall find the ultimate facts and state separately its conclusions of law thereon." WIS. STAT. § 805.17(2). A party may raise the

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

question of the "sufficiency of the evidence to support the findings" on appeal, but this court shall not set aside the circuit court's finding of facts unless they are "clearly erroneous." Sec. 805.17(2) and (4). When reviewing the sufficiency of the evidence to support a criminal conviction, the test is whether "the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990); *see also* ***State v. Opperman***, 156 Wis. 2d 241, 246-47, 456 N.W.2d 625 (Ct. App. 1990) (standard for reviewing the sufficiency of the evidence "is the same whether the fact finder is the court or a jury").

Here, the circuit court made factual findings that someone had come up to Johnson in a bar and struck him without any apparent provocation, knocking him to the floor and leaving him dazed. As Johnson's friends helped him up, Johnson brought out a small, black object about six inches in length, which caused somebody to shout "gun," which in turn led to people running out of the bar in panic. The court determined there was insufficient evidence to conclude beyond a reasonable doubt that the object in Johnson's hand had actually been a gun. The court nonetheless concluded that "flashing"[2] a small, black object in these circumstances was a disorderly act that would tend to, and in fact did, cause a disturbance, and therefore satisfied the elements of disorderly conduct. Johnson does not dispute the circuit court's findings of fact, but contends that no reasonable fact finder could be convinced beyond a reasonable doubt that

[2] The court used the term "flashing" to describe Johnson's action when denying Johnson's motion for a directed verdict. Later, rather than repeat its earlier discussion of the evidence "presented by" the State, the court made reference to its earlier "recitation" of facts when issuing its decision after the close of evidence. We therefore deem the court's earlier discussion of the State's evidence to have been incorporated into its ultimate findings of facts.

merely pulling out a small, black object in a bar, without saying anything, constitutes a disorderly act.

In our view, this case turns upon what the court meant when it found that Johnson was "flashing" the object, and whether the court could reasonably have been convinced by any evidence presented that the manner in which Johnson handled the object was disorderly conduct.

The court stated that it found the testimony of two bartenders to be credible. The first bartender, Vanessa Voss, testified that, shortly after she saw Johnson get knocked down, she saw him "standing up with an object in his hand." Voss described the object as "black and little," and she initially thought it was "a beer bottle or something," but heard someone else say he had a gun. She did not see how Johnson came to have the object in his hand, could not confirm the object was a gun, and did not describe any movements Johnson had made with the object. The second bartender, Amanda Laboy, testified that as the man who had been knocked down got up, she saw him pull something out from his waist area. She described it as a "small black object" that "looked as if it was a gun," although she could not be certain due to the dim lighting. Laboy saw the man "lift his hand" with the dark object in a manner that "disturbed" her, at which time she observed other people screaming and yelling, "gun" and running for the door.

Based on this testimony, the court's characterization of Johnson having "flashed" the object strongly appears to refer to Laboy's testimony that Johnson pulled the object out from his waist area and lifted his hand with it in a disturbing manner. We are satisfied that the court could reasonably draw an inference that Johnson held the item up as one might do if attempting to threaten or warn that one is holding a handgun. This inference was reinforced by the facts that Laboy found the action disturbing and that people in the vicinity immediately began yelling

"gun" and running. Therefore, we conclude that there was sufficient evidence for the court to have been persuaded beyond a reasonable doubt that Johnson's actions amounted to disorderly conduct.

IT IS ORDERED that the judgment of conviction is summarily affirmed under WIS. STAT. RULE 809.21(1).

Diane M. Fremgen
Clerk of Court of Appeals