COURT OF APPEALS
DECISION
DATED AND FILED

March 2, 2000

Cornelia G. Clark
Acting Clerk, Court of Appeals
of Wisconsin

No. 99-2317

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

IN THE INTEREST OF A. S.,
A PERSON UNDER THE AGE OF 17:

STATE OF WISCONSIN,

PETITIONER-APPELLANT,

V.

A. S.,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County: MORIA G. KRUEGER, Judge. *Reversed and cause remanded.*

¶1 ROGGENSACK, J.[1] The State of Wisconsin appeals from an order of the circuit court dismissing a delinquency petition filed against A.S., a thirteen-

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e).

year-old boy. The State claims that the court erred in dismissing the petition for lack of probable cause when it concluded that a student's threats to kill and rape others are insufficient to constitute disorderly conduct. We conclude that under the circumstances in which the threats were made, a student's statements that he is going to kill and rape specific and identifiable individuals, who are personally known by those to whom the threats were made, are sufficient to justify further proceedings on disorderly conduct charges contained within a delinquency petition. Accordingly, we reverse the circuit court's order dismissing the petition and we remand for further proceedings.

BACKGROUND

¶2 The delinquency petition alleges that on April 27, 1999, A.H. contacted Village of DeForest police officer, Eric McGlynn. A.H. told McGlynn that she was at the DeForest Youth Center the night before when A.S., a classmate from her school, threatened to harm others. She said that A.S. said he was going to kill everyone at the middle school he attends, over a ten-minute period of time. He referred to the Colorado school shootings, stating that he was going to "do something similar." A.S. also told A.H. and M.L., another student, that he intended to make people suffer, but that he would spare A.H., M.L. and a few others.

¶3 In addition to these general threats to fellow students and school personnel, A.S. also threatened to harm particular individuals. A.S. said he wanted to hang DeForest Police Officer Diana O'Neill and beat her at the knees. He also said that he would have the assistant principal at his middle school lie on the ground with his hands behind his back, make him count to ten, and then shoot him before he reached the count of ten. A.S. further stated that he wanted to shoot

his social studies teacher. Finally, A.S. told A.H. and M.L. that he was going to rape M.P., another student. M.L. reported to the police that she told A.S. that his threats scared her, and that she had to ask him to stop several times, before he did.

¶4 Another student at the youth center, J.M., also heard A.S. say that he was going to bring guns to school. Additionally, S.R., another classmate, reported to the police that she heard A.S. say that he was going to bring a bomb to school. S.R. also reported to the police that A.S. threatened to shoot M.P. because he likes her and she does not like him. S.R. told the police that A.S. has talked about holding "a school shooting" several times. When questioned by police, A.S. admitted to making substantially similar statements to those reported to the police by his classmates.

¶5 After being taken into custody, A.S. filed a motion to dismiss the delinquency petition, claiming that the conduct as alleged did not constitute disorderly conduct. The circuit court agreed, concluding that the statements made by A.S. were not of the type prohibited by the statute and did not cause or tend to cause a disturbance. Therefore, it dismissed the petition. The State appeals.

DISCUSSION

Standard of Review.

¶6 The sufficiency of a pleading presents a question of law which we review without deference to the circuit court's ruling. *See* ***Sheboygan County v. D.T.***, 167 Wis. 2d 276, 282-83, 481 N.W.2d 493, 496 (Ct. App. 1992). The same principles which govern the sufficiency of criminal complaints apply to petitions in juvenile court proceedings. *See* ***id.*** at 283, 481 N.W.2d at 496. Criminal complaints are not strictly construed; rather, a complaint is sufficient if the facts

alleged "give rise to reasonable inferences which are sufficient to establish probable cause … not in a hypertechnical but in a common sense evaluation . . . ." ***State ex rel. Evanow v. Seraphim***, 40 Wis. 2d 223, 226, 161 N.W.2d 369, 370 (1968) (footnote omitted). Therefore, although a complaint must set forth "the 'essential facts' constituting the offense charged," it need not contain an "encyclopedic listing of all evidentiary facts upon which the state intends to rely …." *See* ***id.*** at 229, 161 N.W.2d at 372; WIS. STAT. § 968.01(2) (1997-98).[2]

First Amendment.

¶7 A.S. first asserts that he cannot be prosecuted for disorderly conduct because the content of his statements is protected by the First Amendment. We disagree. First, the right of free speech is not absolute. Certain classes of speech receive limited or no First Amendment protection, such as obscenity, *see* ***Miller v. California***, 413 U.S. 15, 24 (1973), fighting words, *see* ***Chaplinsky v. New Hampshire***, 315 U.S. 568, 572 (1942), and libel, *see* ***New York Times Co. v. Sullivan***, 376 U.S. 254, 279-80 (1964). Additionally, the Supreme Court has held that threats of violence are not protected by the First Amendment because the government has an interest in "protecting individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur." ***R.A.V. v. City of Saint Paul, Minn.***, 505 U.S. 377, 388 (1992). Here, A.S. threatened to kill and rape specific individuals; accordingly, we conclude that these statements are not protected speech.

[2] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

Disorderly Conduct.

¶8 Next, A.S. argues that his statements, without any further conduct, are not criminally actionable under the disorderly conduct statute. He contends that the statute is designed to apply only to conduct and not to speech unaccompanied by conduct. This assertion is incorrect. The supreme court put this contention to rest when it stated:

> While it is impossible to state with accuracy just what may be considered in law as amounting to disorderly conduct, the term is usually held to embrace all such acts and conduct as are of a nature to corrupt the public morals or to outrage the sense of public decency, *whether committed by words or acts.*

Teske v. State, 256 Wis. 440, 444, 41 N.W.2d 642, 644 (1950) (quoted source omitted) (emphasis in the original). The opinion in ***Teske*** also explains that the disorderly conduct statute is written in the disjunctive and applies to offensive language or to acts or to both. *See* ***id.***

¶9 A.S. also argues that even if speech alone may constitute disorderly conduct, his threats were insufficient because they did not unreasonably offend the community's sense of decency and they were not of a type to provoke a reaction. WISCONSIN STAT. § 947.01 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." It establishes two elements of disorderly conduct: (1) engaging in the wrongful conduct specifically set forth in § 947.01 or "otherwise disorderly conduct"; and (2) undertaking the conduct in circumstances which tend to cause or provoke a

disturbance. A.S. contends that neither element is satisfied by the allegations found in the delinquency petition.

1. Otherwise Disorderly Conduct.

¶10 To satisfy the first element, the State alleges in its petition that A.S.'s statements were "abusive and otherwise disorderly conduct." Wisconsin appellate courts have not directly addressed what is meant by abusive conduct. However, they have considered what constitutes "otherwise disorderly conduct" in several cases. Here, we need not determine if A.S.'s threats constitute abusive conduct because we conclude that his threats could be determined to be otherwise disorderly conduct.

¶11 In ***City of Oak Creek v. King***, 148 Wis. 2d 532, 436 N.W.2d 285 (1989), the supreme court considered what constitutes "otherwise disorderly conduct" under WIS. STAT. § 947.01, when a news reporter followed an emergency vehicle and proceeded through a road block to an airplane crash site. A detective found the reporter and told him that he was in a restricted area and would have to leave. While being escorted out of the area, the reporter broke from the detective, jumped a fence, sprinted to the top of a hill and began taking pictures of the crash. When the detective caught up with the reporter, he again directed the reporter to leave the area. When the reporter refused, he was arrested for disorderly conduct.

¶12 The court began its analysis by noting that the reporter's conduct did not fall into one of the six categories specifically prohibited by statute. *See* ***City of Oak Creek***, 148 Wis. 2d at 541, 436 N.W.2d at 288. Therefore, the court considered whether the conduct was "otherwise disorderly." In holding that the reporter's conduct satisfied this element, the court recognized "the importance of a

coalescing of conduct and circumstances." *See* ***id.*** at 542, 436 N.W.2d at 288-89. Reviewing Wisconsin case law, the court concluded that disorderly conduct often resulted from "'the inappropriateness of specific conduct because of the circumstances involved.'" *See* ***id.*** at 543, 436 N.W.2d at 289 (quoting ***State v. Werstein***, 60 Wis. 2d 668, 672-73, 211 N.W.2d 437, 439 (1973)).

¶13 For example, in ***State v. Elson***, 60 Wis. 2d 54, 208 N.W.2d 363 (1973), the supreme court upheld the conviction of an attorney who refused to leave a hospital until he saw his client because his vigorous protestations occurred in the ward of a mental hospital, upsetting several patients. Similarly, in ***State v. Givens***, 28 Wis. 2d 109, 135 N.W.2d 780 (1965), the supreme court affirmed a conviction for disorderly conduct when several demonstrators conducted a sit-in in a municipal office. The court determined that their conduct was "otherwise disorderly" because they had forced their way into the office and had caused such congestion that it was impossible for the office to function. *See* ***id.*** at 119-21, 135 N.W.2d at 785-87. In each of these cases, convictions for being "otherwise disorderly" resulted from the inappropriateness of the specific conduct given the circumstances in which it occurred.

¶14 Finally, courts have recognized that "'…what would constitute disorderly conduct in one set of circumstances, might not under some other.'" *See* ***City of Oak Creek***, 148 Wis. 2d at 542, 436 N.W.2d at 288 (citation omitted). Unfortunately, recent events have forced the nation's attention on violence in our public schools. A.S.'s threats were made when extreme violence by very young persons has become commonplace. For example, since 1996, no less than fifteen students have made front page news by shooting classmates or teachers at school. *See* Elissa Haney, *Lessons in Violence: A Timeline of Recent School Shootings* (visited February 11, 2000) <http://www.infoplease.com/spot/schoolviolence1.

html>. All fifteen were male and their ages ranged from eleven to eighteen. *See* ***id.*** The most commonly occurring age for the boys who committed these violent crimes was fourteen.[3] Additionally, the U.S. Department of Education has released a comprehensive report which documents that an escalation in violence is occurring in public schools. *See* U.S. DEP'T OF EDUC., NCES 98-030, VIOLENCE AND DISCIPLINE PROBLEMS IN U.S. PUBLIC SCHOOLS: 1996-97 (1998).

¶15 In analyzing whether A.S.'s threats constitute otherwise disorderly conduct, we examine the inappropriateness of the conduct within the totality of the circumstances involved. First, A.S. made violent threats against specific and identifiable individuals. A.S. threatened his social studies teacher, the vice principal of his school, Officer O'Neill, and M.P., a classmate. These were people that the hearers of his threats knew; they were not remote strangers. This could have made his threats more real and frightening to those who heard them.

¶16 Second, A.S.'s threats of violence were explained in detail. A.S. did not simply state that he wanted to kill someone; instead, he painstakingly described how he would kill certain individuals. Of his vice principal, he stated that he would have him lie on the ground with his hands behind his back; he would then instruct him to count to ten; and he would shoot him before he reached ten. Of O'Neill, he said he wanted to hang her by her hands and beat her at the knees. He said he wanted to rape M.P. and to shoot her. His threats could be found to imply that he had given the attacks serious thought.

[3] A.S. argues, and the circuit court agreed, the fact that A.S. is only thirteen weighed in favor of demonstrating that these statements were not otherwise disorderly or tended to cause a disturbance. However, given the range of ages, eleven to eighteen, for recent perpetrators of violence in public schools, a court cannot conclude that as a matter of law, that the threats of a thirteen-year-old boy could not be "otherwise disorderly."

¶17 Third, the demeanor of A.S. when he made the threats was sober. All of the witnesses stated that A.S. was not laughing. Further, M.L. specifically told A.S. that he was frightening her. It was only after she repeatedly asked him to stop that he did so.

¶18 Additionally, A.S.'s threats specifically referred to the shootings that took place in Littleton, Colorado in which fourteen students and one teacher were killed and twenty-three others were wounded. He told his classmates that he was going to "do something similar." Twenty-five years ago, A.S.'s threats that he was going to bring a gun to school and shoot classmates might not have constituted otherwise disorderly conduct. But on the day A.S.'s threats were made, the students who heard them could have had knowledge of recent events of extreme violence in our public schools which formed the informational background against which they processed his threats. That background, in turn, could cause his threats to deeply disturb them. Therefore, given the specter of violence that currently troubles our public schools today, we cannot conclude, as a matter of law, that threats of extreme violence against specific and identifiable persons, such as the ones made by A.S., may never constitute otherwise disorderly conduct.[4]

2. *Causing or Provoking a Disturbance.*

¶19 The second element of disorderly conduct requires that the conduct be of the type which "tends to cause or provoke a disturbance…." *See* WIS. STAT.

[4] One of the factors on which the circuit court relied in determining that A.S.'s statements were not otherwise disorderly was the fact that the targets of A.S.'s threats were not among those who heard him. While this is one factor that may affect the response his threats elicited, it is not dispositive of whether his threats were not disorderly conduct, as a matter of law.

§ 947.01. In determining what conduct satisfies this element, the supreme court has looked to both the actual effect and the potential effect that the conduct had on others. For example, in ***Elson***, 60 Wis. 2d at 66, 208 N.W.2d at 370, the court upheld a jury verdict which found that an attorney, who refused to leave a mental ward until he saw his client, exhibited conduct that tended to cause or provoke a disturbance. The court noted that numerous patients were gathering in response to the attorney's arguments and refusals to leave the ward. *See* ***id.*** at 60, 208 N.W.2d at 367. Further, a nurse and hospital aide testified that one patient nearby became agitated and began yelling loudly. There was also testimony that several of the patients who gathered to listen to the commotion often strike out when agitated. *See* ***id.*** at 62, 208 N.W.2d at 368. The court relied on this testimony, the effect the attorney's behavior had on patients at the hospital, as the basis for the jury's finding that the behavior tended to cause or provoke a disturbance.

¶20 Similarly, in ***City of Oak Creek***, 148 Wis. 2d at 543-44, 436 N.W.2d at 289, the court upheld a newspaper reporter's conviction of disorderly conduct based on the possible effect the conduct could have had on others. In analyzing whether the reporter's conduct tended to cause a disturbance, the court pointed out that the reporter's refusal to leave a restricted area occurred within the presence of other members of the public. *See* ***id.*** The court stated "[i]n a situation which has the potential for significant crowd control problems, common sense dictates that if one person is allowed to openly defy the authority of an officer in charge, others may soon follow." *See* ***id.*** The court also reasoned that it is not necessary that an actual disturbance occur in order to contravene the disorderly conduct statute; it is sufficient that there was a possibility of a disturbance under the circumstances that existed at the time. *See* ***id.*** at 545, 436 N.W.2d at 290. Therefore, both ***City of Oak Creek*** and ***Elson*** demonstrate the court's reliance on the presence of others as

one basis of support for establishing that the conduct tended to cause or provoke a disturbance.

¶21 In the case at hand, A.S.'s threats were made in the presence of other classmates to whom he specifically targeted identified individuals for future acts of violence. His threats were not casual comments, but rather, they were made against persons personally known to the students to whom he spoke. They were of sufficient force that they frightened at least one of the students, so that she repeatedly asked him to stop. Additionally, another student was disturbed enough by his threats that she contacted the police to report them.[5] Finally, A.S.'s statements caused several police officers to spend time and resources investigating the threats, which they took very seriously. Therefore, drawing all reasonable inferences from the facts set forth in the petition, A.S.'s threats could be found to tend to provoke a disturbance.

¶22 Our opinion today should not be construed to mean that every statement made by an angry student meets the threshold of disorderly conduct. We conclude only that based on the allegations of this petition, it was error to dismiss it because the facts as pled and all reasonable inferences drawn therefrom could support a conclusion that A.S.'s statements were otherwise disorderly and tended to cause or provoke a disturbance. Therefore, the petition is not insufficient as the charges stated therein are not "capricious." *See* ***State ex rel.***

[5] In his brief, A.S. asserts that it was A.H.'s mother that contacted the police and cites the delinquency petition for this proposition. The petition, however, states that A.H. contacted the police, and does not mention A.H.'s mother. However, even if A.H.'s mother were the one to contact the police, A.H. was concerned enough to discuss the incident with her mother shortly after the threats occurred.

Cullen v. Ceci, 45 Wis. 2d 432, 444, 173 N.W.2d 175, 180 (1970) (citations omitted).

CONCLUSION

¶23 We conclude that under the circumstances in which A.S.'s threats were made, his statements that he was going to kill and rape specific and identifiable individuals, who were personally known to those to whom the threats were made, are sufficient to justify further proceedings on disorderly conduct charges contained within a delinquency petition. Accordingly, we reverse the circuit court's order dismissing the petition and we remand for further proceedings.

By the Court.—Order reversed and cause remanded.

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