COURT OF APPEALS
DECISION
DATED AND FILED

April 26, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

No. 99-2712

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANDRAE T. D'ACQUISTO,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County: ROGER P. MURPHY, Judge. *Affirmed.*

¶1 SNYDER, J.[1] Andrae T. D'Acquisto appeals from a civil forfeiture judgment finding him guilty of hunting deer after hours contrary to WIS. ADMIN. CODE § NR 10.06(2)(b).[2] He contends that the evidence was insufficient

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(g) (1997-98). All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

[2] The 1998 version of the DNR regulations is applicable here.

to prove that he was "hunting" after hours as defined in WIS. STAT. § 29.01(8) (1995-96). He also contends that the trial court failed to consider alternative reasons for why he was in a tree stand with an uncased bow and arrow other than hunting. We affirm the judgment.

¶2 The relevant facts were established during a trial to the court.[3] Conservation Warden Kyle Drake testified that on December 20, 1998, the closing time for legal deer hunting with bow and arrow was 4:38 p.m. On that date Drake was in the Village of Menomonee Falls where he observed D'Acquisto, dressed in camouflage hunting clothing, in a tree stand with a bow. His observations of D'Acquisto started at 4:20 p.m. and continued until approximately 5:16 p.m. According to Drake, D'Acquisto was looking "from side to side down on the ground" as if "looking for deer."

¶3 At 5:14 p.m. Drake observed D'Acquisto "put an arrow into his quiver[4] and then put his bow and his quiver ... in a case." Drake approached D'Acquisto while he was still in the tree and identified himself as a conservation warden. Drake asked D'Acquisto if he was hunting buck or doe deer, whether he had a watch and if he could produce a hunting license. Drake stated that D'Acquisto's response was that he was not hunting. Drake said that D'Acquisto told him that he had put his bow in the case at 4:20 p.m., that he was still in the tree because someone had been in his tree stands hunting after hours and that he

[3] D'Acquisto was acquitted of an additional, consolidated charge of operating an ATV on private property without consent contrary to WIS. STAT. § 23.33(3)(c). Peter Goodman was cited with the same violation of WIS. ADMIN. CODE § 10.06(2)(b) as D'Acquisto, and their cases were consolidated for trial. Goodman was also found guilty.

[4] Warden Drake described a "quiver" as a "small apparatus in which the arrows are located."

wanted to catch the individual. D'Acquisto asked Drake if he was that person. Drake testified that D'Acquisto later denied that he said he had placed his bow in the case at 4:20 p.m.

¶4 D'Acquisto admitted that he was "hunting out of a tree stand" on the date and at the place alleged in the citation. He testified that someone had been entering and molesting his property without his permission,[5] that he was aware that hunting closed at 4:38 p.m., that he quit hunting at 4:20 p.m. and that it was typical for him to stay in the tree stand after hunting hours to prevent scaring deer from the area. D'Acquisto stated that his understanding of hunting with a bow and arrow was that the arrow had to be on the arrow rest of the bow, or "notched,"[6] and that "notching the arrow is what constitutes hunting." He claimed that he had unnotched the arrow from his bow at 4:20 p.m. and placed it in the quiver. D'Acquisto further testified that he came down from the tree stand at 5:08 p.m., went back up the tree when he heard someone coming toward him and that he thought that Drake "was a gun hunter out there during bow season on my property."

¶5 D'Acquisto contends that the State failed to prove that he was "hunting" in violation of WIS. ADMIN. CODE § NR 10.06(2)(b) at the time of the alleged violation. Section NR 10.06(2)(b) states in relevant part:

> *General prohibition*. Except as provided [otherwise], no person may hunt ... any game species on which an open season is prescribed on any day during the open season

[5] D'Acquisto described "molesting" as the pouring of kerosene around the tree stand sites resulting in a lot of legally placed corn not being eaten.

[6] The record is confusing as to whether the correct term is "knocked" or "notched." As did the trial court in its findings, we use the term "notched" to express an arrow being readied to shoot from a bow.

> before the a.m. times or after the p.m. times established in sub. (3).

It is undisputed that under sub. (3) the hunting hours for December 20, 1998, closed at 4:38 p.m. and that D'Acquisto remained in the tree stand with his bow and arrow past that closing time.

¶6 As framed by D'Acquisto, the appellate issue is "whether there was sufficient evidence for the trial court to find [D'Acquisto] guilty of hunting after 4:38 p.m." WISCONSIN STAT. § 29.01(8) (1995-96), as amended by 1997 Wis. Act 1, § 2, defines "hunt" or "hunting" to include "shooting, shooting at, pursuing, taking, catching or killing any wild animal or animals."[7] We disagree with D'Acquisto that it is necessary to address the meaning of the term "pursuing," as used in § 29.01(8) (1995-96), to determine if he was hunting in violation of WIS. ADMIN. CODE § NR 10.06(2)(b). Because D'Acquisto concedes that he was hunting wild animals prior to 4:20 p.m., the question is whether he continued hunting wild animals after that time, especially beyond 4:38 p.m. That is a question of fact for the trial court.

¶7 While D'Acquisto concedes that he was hunting prior to 4:20 p.m., he contends that he terminated his hunting when he unnotched the arrow from his bow at that time and placed it in his quiver. Drake testified that he observed D'Acquisto place the arrow in his quiver at 5:14 p.m. The trial court found that D'Acquisto was in the tree stand, that hunting ended at 4:38 p.m., that D'Acquisto

[7] The statutory definition contained in the 1997-98 version of the Wisconsin Statutes does not apply to a violation occurring on December 20, 1998. The applicable definition is that contained in WIS. STAT. § 29.01(8) (1995-96), as amended by 1997 Wis. Act 1, § 2, effective April 1, 1997. Wisconsin Statutes 1997-98 contains a definition in WIS. STAT. § 29.001(42) that amended and renumbered WIS. STAT. § 29.01(8) (1995-96); § 29.001(42) did not become effective until January 1, 1999.

remained in the tree stand until approximately 5:08 p.m. to 5:15 p.m., that he possessed a bow and arrow while in the tree stand and that he did not lower the bow and arrow or get down from the tree stand at 4:38 p.m.

¶8 The trial court accepted the warden's testimony that D'Acquisto was "definitely holding [his] bow[] until [he] came down from the tree stand" and found that arrows were available to D'Acquisto and that he could have easily been ready to shoot an animal if one appeared. The weight of the evidence and credibility of witnesses are matters resting within the province of the trier of fact. *See* ***Wurtz v. Fleischman***, 97 Wis. 2d 100, 107, 293 N.W.2d 155 (1980). This is because the trier of fact is in the best position to observe the manner and demeanor of the witnesses. *See* ***Kies v. Hopper***, 247 Wis. 208, 210-11, 19 N.W.2d 167 (1945). The trial court concluded, based upon the totality of the circumstances established at trial, that D'Acquisto remained in the tree for the purpose of hunting deer after hunting hours and adjudged him guilty.

¶9 **"**Findings of fact by the trial court will not be upset on appeal unless they are against the great weight and clear preponderance of the evidence." ***Cogswell v. Robertshaw Controls Co.***, 87 Wis. 2d 243, 249, 274 N.W.2d 647 (1979). The trial court's finding that under the totality of the circumstances D'Acquisto continued his hunting of wild animals, as commenced prior to 4:20 p.m. until after the legal closing time of 4:38 p.m., is not against the great weight and clear preponderance of the evidence.

¶10 D'Acquisto also contends that the trial court failed to properly consider innocent reasons for why he remained in the tree stand other than to hunt. He argued to the trial court that he remained in the tree after closing because he did not wish to permanently spook deer that might be present in the area and that

he was watching for a trespasser who had been molesting his property. The trial court specifically rejected the property molestation argument, and the State correctly cites to controlling language in ***State v. Bodoh***, 226 Wis. 2d 718, 595 N.W.2d 330 (1999), as to D'Acquisto's innocent presence contentions:

> A theory of innocence which appears to be reasonable to an appellate court on review of the record may have been rejected as unreasonable by the trier of fact in view of the evidence and testimony presented at trial. It is the function of the trier of fact, and not of an appellate court, to fairly resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to the ultimate facts.

Id. at 727 (citing ***State v. Poellinger***, 153 Wis. 2d 493, 506, 451 N.W.2d 752 (1990)).

¶11 We are convinced that the trial court's findings of fact were not in error, and we affirm its judgment.

By the Court.—Judgment affirmed.

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