COURT OF APPEALS
DECISION
DATED AND FILED

February 8, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP2430-FT **Cir. Ct. No. 2005FO1572**

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

CITY OF OSHKOSH,

PLAINTIFF-RESPONDENT,

V.

TERRI L. WIRTH,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Winnebago County: ROBERT HAWLEY, Judge. *Reversed.*

¶1 ANDERSON, J.[1] Terri L. Wirth appeals her conviction for disorderly conduct in violation of OSHKOSH, WIS., MUN. CODE § 17-1 adopting

[1] This is a one-judge appeal pursuant to WIS. STAT. § 752.31(2)(b) (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

WIS. STAT. § 947.01. We reverse her conviction because her contribution of money to purchase beans, sauerkraut and eggs is unrelated, in time, substance and location to the vandalism committed by others.

¶2 On the evening of May 21, 2005, a van used by an Oshkosh West High School student was "beaned and sauerkrauted and egged" while parked outside of the family home at 775 Weatherstone in the City of Oshkosh. As it turns out, there were at least eight other incidents the same night, and an investigation by the Dean of Students at Oshkosh West and the Oshkosh Police Department turned up thirteen students involved in the nine incidents. Wirth, a student at Oshkosh West, was ticketed for disorderly conduct. She entered a plea of not guilty and had a bench trial at which she was found guilty.

¶3 Wirth appeals her conviction. She asserts that our standard of review is a mixed question of fact and law requiring us to determine what happened and whether those facts fulfill a particular legal standard. *See* ***State v. Gollon***, 115 Wis. 2d 592, 600, 340 N.W.2d 912 (Ct. App. 1983). She states that we are to "apply the great weight/clearly erroneous standard to the factual part, while independently reviewing the conclusion of law."

¶4 We disagree. It is obvious from the trial transcript, Wirth's brief and the City's brief that the facts are not in dispute. The only issue we must address is whether Wirth's conduct is proscribed by the City's disorderly conduct ordinance. This is a question of statutory construction; questions of statutory construction or the application of a statute to undisputed facts are questions of law on which we do not defer to the circuit court. ***Truttschel v. Martin***, 208 Wis. 2d 361, 364-65, 560 N.W.2d 315 (Ct. App. 1997).

¶5 In a brief bench trial, it was established that Wirth and ten other girls had a sleep over on the evening of May 20-21. Sometime before midnight, the girls snuck out of the house and split up into two cars. The girls who had money, including Wirth, pooled it, and they drove to a store where they purchased the "ammunition" for the evening. When the cars reached 775 Weatherstone, the car with Wirth in the backseat parked eight houses away. All of the girls in the car, including Wirth, remained in the car while the individuals in the second car "beaned and sauerkrauted and egged" the van in the driveway. Wirth rested without presenting any contrary evidence.

¶6 The trial court found Wirth guilty, "based upon clear, satisfactory and convincing evidence … that you chipped in and all the girls knew what was going on that evening."

¶7 The City's ordinance adopts WIS. STAT. § 947.01, which 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.

¶8 Even a cursory review of the evidence demonstrates that Wirth's conduct does not fall into any of the specifically enumerated categories forbidden in the City's disorderly conduct ordinance. As a result, the question is whether there are any facts which would support the conclusion that Wirth's conduct was "otherwise disorderly." The supreme court faced this question in ***City of Oak Creek v. King***, 148 Wis. 2d 532, 541, 436 N.W.2d 285 (1989), and provided this answer:

> 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.
>
> Section 947.01, Stats., therefore, proscribes conduct in terms of results which can reasonably be expected therefrom rather than attempting to enumerate the limitless number of antisocial acts which a person could engage in that would menace, disrupt, or destroy public order. Such is especially true in regard to the "otherwise disorderly" proscription wherein the relatedness of the conduct and the circumstances is of ultimate importance. (Citations omitted.)

¶9 We cannot say with any confidence that Wirth's contribution of money to purchase the "ammunition" used by others is "otherwise disorderly conduct." While she knew what the money would be used for, she did not participate in the vandalism of the minivan; she remained in a car parked eight houses away. Her conduct—the contribution of money—is not related to the circumstances. In ***Oak Creek***, the supreme court made it clear that of ultimate importance to the "otherwise disorderly" proscription is a "relatedness of the conduct and the circumstances." ***Oak Creek***, 148 Wis. 2d at 541. "It is the combination of conduct and circumstances that is crucial in applying the (ordinance) to a particular situation." ***Id.*** at 542 (citation omitted). Here, the conduct that is related to the circumstances is that of dumping or throwing or spreading beans, sauerkraut and eggs on the minivan.

¶10 Recognizing that Wirth's conduct might not fall into the "otherwise disorderly" category, the City argues that the evidence supports conviction for disorderly conduct as a party to the violation of the disorderly conduct ordinance. The City points out that it has adopted a "party to" ordinance violations provision, OSHKOSH, WIS., MUN. CODE § 1-8.1, which mirrors WIS. STAT. § 939.05. It argues that while it is desirable to refer to the "party to" section of the ordinances in the citation issued to the defendant, no prejudice has been done to Wirth

because during the course of the investigation she became aware of what she was being charged with and was ably represented by counsel.

¶11 The City relies on ***State v. Charbarneau***, 82 Wis. 2d 644, 264 N.W.2d 227 (1978), to support its position. ***Charbarneau*** is inapposite; in that case, the prosecutor filed an amended information charging the defendant as a party to the crime but withdrew it when defense counsel objected. ***Id.*** at 648. However, in withdrawing the amended information on the day of trial, the prosecutor made it very clear that he was relying on the party-to-the-crime theory. ***Id.*** at 647, 649-50. In this case, the first time the City prosecutor alerted Wirth, or her counsel, that the City was relying on a "party to" theory was in the brief filed in this court.

¶12 We reject the City's argument that Wirth is not prejudiced. Wirth is prejudiced by the City's tardy reliance on the "party to" theory. As she points out, she developed her trial strategy on the original charge of disorderly conduct and if she had known the City was relying on the "party to" ordinance, she would have designed an entirely different trial strategy, possibly testifying herself.

By the Court.—Judgment reversed.

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